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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 253

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 1, 1939
CERTIORARI GRANTED OCTOBER 9, 1939

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1 In United States Circuit Court of Appeals for the Sixth Circuit

No. 8267

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876, *Petitioners*

v.

THE NATIONAL LABOR RELATIONS BOARD, *Respondent*

Petition to review and set aside a final order of the National Labor Relations Board designated "Decision and Direction of Election" and entered by said board on the first day of March 1939, in the matter of Consumers Power Company and International Brotherhood of Electrical Workers, Local 876, and designated upon the records of the National Labor Relations Board as case No. R-1004

(Filed April 5, 1939)

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

2 International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers, Local Union No. 876, Petitioners, being aggrieved by a final Order, hereinafter referred to, of the National Labor Relations Board, pursuant to authority conferred upon said Petitioners by Section 10 (f) and Section 9 (d) of the National Labor Relations Act of July 5, 1935 [29 U. S. C., Section 160 (f) and Section 159 (d)], respectfully pray this Honorable Court to review and set aside said final Order, designated "Decision and Direction of Election" and entered and issued on March 1, 1939, by said National Labor Relations Board in a proceeding before it entitled "In the Matter of Consumers Power Company and International Brotherhood of Electrical Workers, Local 876," and designated upon the records of said Board as Case No. R-1004.

In support of said Petition, your Petitioners respectfully show:

First: Your Petitioner, International Brotherhood of Electrical Workers, Local Union No. 876, is a lawfully organized, existing, and operating labor organization of wage workers, and a constituent of the said International Brotherhood of Electrical Workers, organized, existing, and operating in and throughout the several States of the United States and various provinces of the Dominion of Canada, and particularly in the State of Michigan, in and throughout which State this Honorable Court has and exercises its lawful jurisdiction, said Petitioner, International Brotherhood of Electrical Workers, Local Union 876, and its membership of wage workers, being subject to the jurisdiction, laws, and usages of said International Brotherhood of Electrical Workers as a constituent part thereof,

and both said International Brotherhood of Electrical Workers and said International Brotherhood of Electrical Workers, Local Union No. 876, being affiliated with the American Federation of Labor.

The Petitioner, International Brotherhood of Electrical Workers, is a lawfully organized and existing labor organization, with jurisdiction over its said Local Union No. 876, the Petitioner aforesaid, said Local Union No. 876 being composed of wage workers,
3 subject to the jurisdiction, laws and usages of said International Brotherhood of Electrical Workers, as hereinabove stated.

Said International Brotherhood of Electrical Workers, Local Union No. 876, is composed of wage workers in the employ of Consumers Power Company, hereinafter sometimes called the "Company," an operating public utility corporation, organized and existing under the laws of the State of Michigan, and which is engaged in the business of generating, distributing, and supplying power and electric service in the State of Michigan and within the jurisdiction of this Honorable Court.

Second: That the Respondent, National Labor Relations Board, hereinafter called the "Board," is an administrative board created by the National Labor Relations Act of July 5, 1935 (49 Stat. 449), and having the powers conferred, and charged with the duties imposed upon it by said Act.

Third: That Utility Workers Organizing Committee purports to be a labor organization, whose membership includes employees of the Consumers Power Company aforesaid, and is affiliated with the Congress for Industrial Organization.

Fourth: That this Petition is filed under the provisions of Section 10 (f) and Section 9 (d) of the National Labor Relations Act.

Fifth: That on December 22, 1938, upon the initiative and request of your Petitioner, Local Union No. 876, the National Labor Relations Board, in certain proceedings before it entitled, as above stated, "In the Matter of Consumers Power Company and International Brotherhood of Electrical Workers, Local 876," and designated upon the records of said Board as Case No. R-1004, issued a Decision and Direction of Election (amendatory of previous Decisions and Directions of Election issued theretofore in said proceeding on November 8, 1938, and November 23, 1938, respectively), directing the Regional Director of the Board for the Seventh Region, acting as agent for the Board, and subject to National Labor Relations Board Rules and Regulations, Series 1, as amended, to conduct an election by secret ballot among all employes of the Consumers Power Company, excluding general and assistant foremen, plant supervisors,
4 crew foremen, and other supervisory employees, with certain exceptions, office employes, office building janitors and watchmen, collectors, connected load inspectors, electrical, mechanical, and civil engineers, efficiency men and junior engineers, draftsmen, surveyors, chemists, architects, temporary common laborers hired for a

specific job and for not more than six months, part-time local service men and local service men not performing mechanical work in the regular course of employment, and storekeepers with supervisory powers who did not ordinarily do mechanical work, but including load dispatchers, meter readers and bill distributors, plant janitors and watchmen, and storekeepers other than those excluded above, who were on the pay roll of Consumers Power Company for the pay roll period next preceding August 29, 1938, except those who had thereafter quit or been discharged for cause, to determine whether such employes named as being eligible to vote desired to be represented by Petitioner, International Brotherhood of Electrical Workers, Local Union No. 876, affiliated with the American Federation of Labor, or by the said Utility Workers Organizing Committee, affiliated with the Congress for Industrial Organization, for the purpose of collective bargaining, or by neither.

Sixth: That the wage workers and employes in the employ and service of said Consumers Power Company and who are embraced and included in the membership of said International Brotherhood of Electrical Workers, Local Union 876, embraced and included and embrace and include the various kinds and classes of employees and wage workers in the employ and service of said Consumers Power Company hereinabove, to wit, in the Fifth paragraph of this Petition, particularly described, designated, and enumerated as eligible to vote in said election, mentioned and referred to in said Fifth paragraph, and as possessed of the right and entitled to vote therein.

Seventh: That said amended Decision and Direction of Election provided for the holding of the election within seventy days from November 8, 1938, the date of the original Decision and Direction of Election; that pursuant to said amended Direction of Election the said Regional Director of the Board conducted an election by said employes of said Consumers Power Company by secret ballot from January 10 to January 13, 1939, to elect and designate the representative for collective bargaining as aforesaid.

Eighth: That thereafter said Regional Director of the Board, reported in an Intermediate Report filed by him on January 10, 1939, and caused to be served upon the parties, as the results of the election held as aforesaid, the following:

Total number of employees eligible	2,977
Total number of ballots cast	2,806
Total number of votes for Petitioner, International Brotherhood of Electrical Workers, Local Union No. 876	1,072
Total number of votes for Utility Workers Organizing Committee	1,164
Total number of votes for neither	506
Total number of challenged ballots	52
Total number of blank ballots	1
Total number of void ballots	11

As none of the above-named contestants had received a majority of the votes cast in the said election, the Board could not, within the provisions of the National Labor Relations Act, certify either

your Petitioner, International Brotherhood of Electrical Workers, Local Union No. 876, or said Utility Workers Organizing Committee, as representative of the employes of the Company for the purposes of collective bargaining.

Ninth: That thereafter, by letter dated February 8, 1939, the Board, by its Secretary, Nathan Witt, advised Mr. D. W. Tracy, International President of your Petitioner, International Brotherhood of Electrical Workers, that the Board had been notified by said Utility Workers Organizing Committee that it desired the holding of a run-off election in the case, and that the Board would direct the holding of a run-off election unless objection thereto was received within five days from the date of said letter; that while the text of the said notification by said Utility Workers Organizing Committee to the Board that it desired to hold a run-off election is not
6 available to your Petitioners, they aver that by letters dated respectively, February 2, 1939, and February 6, 1939, counsel for Utility Workers Organizing Committee and the Chairman thereof requested the said Board to direct the holding of a run-off election among the employes in the appropriate unit of the Company, providing for a choice only for or against said Utility Workers Organizing Committee.

Tenth: That in the meantime, however, that is to say, subsequent to the filing by the said Regional Director of the Board of his Intermediate Report showing the results of the election aforesaid, and prior to the time of the receipt by the said International President of your Petitioner, International Brotherhood of Electrical Workers, of the said letter of the Board, of February 8, 1939, intimations had been made, and widely circulated, by the Utility Workers Organizing Committee, that it only, or it and Neither, would appear on any secret ballot that would be used by the Board in any so-called run-off election, without the name of your Petitioner, International Brotherhood of Electrical Workers, Local Union 876, appearing upon said ballot at all, whereby the employes in said unit of said Company would be deprived of voting for your said Petitioner, and the election of a collective bargaining agency to represent the employes of the Company would not be an election at all between the principal and real contestants who embraced and embrace by far the greater number and substantial body of the employes of said company eligible to vote in said election, and between whom the real and only contest for the choice of the collective bargaining agency existed and exists.

Eleventh: That, thereupon, in response to the said letter of the Board of February 8, 1939, to D. W. Tracy, International President of your Petitioner, International Brotherhood of Electrical Workers, informing him, as aforesaid, that the Board would direct the holding of a run-off election unless objection thereto was received within five days from the date of said letter, your Petitioners, through their general counsel, in their respective behalfs, on February 11, 1939,

informed and notified the National Labor Relations Board, by letter and petition, in writing, at its offices in Washington, D. C., that they had no objection to the run-off election referred to in the
7 Board's above mentioned communication, if the contestants or candidates named upon the secret ballots used in the election would be the two organizations, namely, the Utility Workers Organizing Committee, and your said Petitioner, International Brotherhood of Electrical Workers, Local Union 876, which, respectively, had received the highest and the next highest number of votes in the last preceding election; further, that such condition was apposite and important with respect to the proposed run-off election, because intimations had been made, and rather widely circulated, by said Utility Workers Organizing Committee that it only, or it and Neither would appear upon the secret ballot, without the name of your said Petitioner, International Brotherhood of Electrical Workers, Local Union 876, appearing at all, whereby the employes would be deprived of voting for your said Petitioner, and the "election" of a collective bargaining agency to represent the employes of the Company would not be an election at all between the principal and real contestants who embraced decidedly the greater number and substantial body of the employes, and between whom the real contest for the choice of the collective bargaining agency lay; and your Petitioners, further in said writing addressed to said Board, requested and petitioned that said run-off election be held in the manner hereinabove mentioned as having been requested by them, namely, that the contestants or candidates be the two organizations which, respectively, had received the highest and the next highest number of votes, in the last preceding election, and stated that, if said election would be so held, they would have no objection to the same; and further, that if, however, the said election was not to be so held, or if your said Petitioner, International Brotherhood of Electrical Workers, Local Union 876, was not to appear upon the ballots to be used in said election as a contestant and candidate therein for collective bargaining agent to represent employes of the Company, then, your said Petitioners most respectfully and most decidedly objected to the suggested run-off election, which, if so held, would utterly deny and deprive them of their rights to participate in an election for the choice of a collective bargaining representative, as provided for and secured to them by the National Labor Relations Act, as well as by their fundamental
8 legal rights; and your Petitioners, further in said writing, set forth that, if said Board had any hesitancy or doubt about the propriety and justice of the said request of your Petitioners, International Brotherhood of Electrical Workers, and said Local Union, that said Local Union should appear upon the ballot in the run-off election in question, their counsel would, on behalf of said Petitioners, respectfully ask a hearing by the Board thereupon; and the said Board was further notified and requested in said writing that, if the run-off election should be held as requested by said Petitioners, a

revised eligibility list of employes as from August 29, 1938, to January 1, 1939, be set up and furnished to them as well as to their opponent in said run-off election; that a true duplicate copy of said original writing of February 11, 1939, addressed to said Board as aforesaid, is filed herewith marked "Petitioners' Exhibit No. 1," and prayed to be taken as a part of this Petition.

Twelfth: That subsequently, on February 24, 1939, a hearing of oral argument on the question of including your Petitioners as a contestant and candidate on the ballot in the run-off election was held by the Board at its offices in Washington, D. C.

Thirteenth: That after said hearing upon the part of the Board on February 24, 1939, as mentioned in the preceding paragraph herein, your Petitioners received no further communication or notice in the premises until March 1, 1939, when the Board entered and issued its Decision and Direction of Election, a true and duplicate copy of which Decision and Direction of Election, together with a communication dated March 1, 1939, from the National Labor Relations Board to counsel for your Petitioners, enclosing said copy of said Decision and Direction of Election, is filed herewith, marked "Petitioners' Exihibit No. 2," and prayed to be taken as a part of this Petition.

Fourteenth: That by said Decision and Direction of Election, entered and issued by said National Labor Relations Board on March 1, 1939, aforesaid, the said Board directed that the said question concerning representation which had arisen be resolved by a run-off election, in which the employes in the appropriate unit be given the opportunity to decide whether or not they desire to be represented by Utility Workers Organizing Committee, the Affiliate aforesaid of the Congress for Industrial Organization, and the said Board ordered and directed that "to determine representatives for the purposes of collective bargaining with Consumers Power Company, Jackson, Michigan, an election by secret ballot shall be conducted within 45 days from the date of this Direction, under the direction and supervision of the Regional Director for the Seventh Region, acting in this matter as Agent of the National Labor Relations Board, and subject to Article III, Section 9, of said Rules and Regulations, among all the employes of the Company," excluding general and assistant foremen, plant supervisors, crew foremen, and other supervisory employes except as expressly included below, office employes, office building janitors and watchmen, collectors, connected load inspectors, electrical, mechanical, and civil engineers, efficiency men and junior engineers, draftsmen, surveyors, chemists, architects, temporary common laborers hired for a specific job and for not more than 6 months, part-time local service men and local service men who do not perform mechanical work in the regular course of employment, and storekeepers with supervisory powers who do not ordinarily do mechanical work, but including load dispatchers, meter readers and bill distributors, plant janitors and

watchmen, and storekeepers other than those excluded above, who were on the pay roll of the Company for the pay roll period next preceding August 29, 1938, except those who have since quit or been discharged for cause, to determine whether or not they desire to be represented by Utility Workers Organizing Committee, for the purposes of collective bargaining.

Fifteenth: In the First Annual Report of the National Labor Relations Board, for the Fiscal Year ended June 30, 1936, Article 3, relating to the National Labor Relations Act and particularly its "Policy and Provisions," it is declared by the Board that "The Act, in its substantive and procedural provisions . . . makes no departure from traditional principles of substantive law or statutory administration."

And referring to the rights of employes guaranteed by Section 7, to self-organization and to bargain collectively through representatives of their own choosing, etc., and to the provisions of Section 9, relating to representatives and elections, it is further said by the Board:

"4. Representatives and Elections. Since collective bargaining is carried on through representatives of employees, the act follows established precedents for the factual determination of such representatives. Section 9 (a) provides that representatives selected by the majority of employees in a unit appropriate for collective bargaining shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. The act thus affirms the majority-rule principle, which is inherent in the practice of collective bargaining as in the practive of dealing through representatives generally; whether for governmental, corporate, or other purposes.

"Section 9 (b) authorizes the Board to determine in the appropriate case whether, in order to secure to employees the full benefit of their right to self-organization and collective bargaining, and otherwise to effectuate the policies of the act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

"In order to resolve in an orderly way doubts as to the representatives of employees, the Board is specifically empowered to investigate questions concerning the representation of employees, to conduct elections in appropriate cases, and to certify to the parties the name or names of the representatives that have been designated [sec. 9 (c)]."

Section 1 of the said National Labor Relations Act states: "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of

representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Section 7 of the Act, title "Rights of Employees" provides:

"Employees shall have the right to self-organization, to
11 form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Section 9 of the Act secures to employees the choice or selection of representatives for collective bargaining. It provides:

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ."

"(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

"(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

Sixteenth: Your Petitioners are advised and respectfully show that said National Labor Relations Act, in conferring upon and vesting in the employes in the appropriate unit the right to elect, and, in the exercise of such right of election, to choose, select, and designate by a secret ballot of such employes, and by a majority of them in such appropriate unit, the exclusive representation of all the employes in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment, and in expressly providing that said
Board shall "insure to employes the full benefit of their right
12 to collective bargaining," and in declaring it to be the policy of the United States, for the purposes of said Act, to encourage the practice and procedure of collective bargaining "by protecting the exercise by workers of full freedom of . . . designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual

aid or protection," and in again emphatically enacting in Section 7, that employes "shall have the right . . . to bargain collectively through representatives of their own choosing for the purpose of collective bargaining or other mutual aid or protection," intended as one of the principal, if not the principal, means of securing to employes the benefits, protection, security, and relief, designated by the Act in their behalf and in the general public interest, that said employes should have free, full, and unrestricted elective franchise, or suffrage, to be exercised by ballot, in the choice, selection, and designation by them of their representatives for collective bargaining; that such elective franchise or suffrage, in its nature, scope, and essentials, and particularly in its fullness, freedom, and unrestrictedness, and, in its relation to the majority-rule princple, is analogous to the elective franchise or right of suffrage, as declared by the Report of the Board above quoted, for "governmental, corporate, or other purposes," and, with respect to which, as the Board's said Report also states, "the Act, both in its substantive and procedural provisions . . . makes no departure from traditional principles of substantive law or statutory administration."

Your Petitioners, therefore, respectfully show that a predominant purpose of the said Act, for the effectuation of its policies aforesaid, was to insure, beyond denial or abridgement, upon the part of either employers or the Board itself, full, free, and untrammeled action upon the part of said employes in the choice or election of their representatives for the supreme and vital purposes of collective bargaining, and that such right of such employes, under and by virtue of said Act, and the principles of law applicable to the same, for the selection and designation of their own representation in said matters of rates of pay, hours of labor, working conditions,
and other material interests, is a valuable property right and a
13 valuable personal right, the impairment or deprivation of
which would result in irreparable damage and injury to said employes and, in this case, to your petitioners.

Seventeenth: Your Petitioners, furthermore, are advised and respectfully show that the said elective franchise and right of suffrage vested in such employes for the choice and election of representation for collective bargaining were and are not a mere and restricted right to vote for or against some one single candidate, whether an individual or organization, for collective bargaining representative, but, on the contrary, consisted and consists of the free exercise of a full, unabridged right of active and positive choice of such representative as each elector may or might desire to vote for as representative to fill said highly important office, as contradistinguished from a bare limited veto against, or expression of opposition to, a single designated candidate presented and appearing solely and alone upon the ballot; in other words, that the right of election conferred and guaranteed by the Act is the free and full exercise by

the electors of an affirmative selection and designation of representatives "of their own choosing." The plain, established meaning and import of the terms employed in the Act in this connection, namely, "choose," "select," "designate," "election," "ballots," "of their own choosing," "selected by the majority," "the full benefit of their right to collective bargaining," all consistently and uniformly lead to the one conclusion that the right of election so conferred was a right of affirmatively choosing by vote a person or organization to fill and exercise the office of representative for collective bargaining, and that when the voter or elector, as in this case, is deprived, in whole or in part, of his full right of exercising his own choice, selection, and designation of the representative in question, he loses his elective franchise as the same is intended to be vouchsafed to him by the Act.

By reason of the premises, your Petitioners are advised and respectfully show that the said Decision and Direction of Election entered and issued by said Board on March 1, 1939, is unauthorized by, and in violation of, the said National Labor Relations Act in the respects hereinabove indicated, and illegally, arbitrarily, and in violation of said Act, with respect to both its provisions and
14 policy, denies to your Petitioners, and deprives them of, highly important and valuable property rights and personal rights secured and guaranteed to them by the said Act; and your Petitioners further show that, for the reasons and in the respects aforesaid, the said Decision and Direction of Election entered and issued by said Board on said March 1, 1939, constituted and constitutes an unequal, discriminatory, confiscatory, and illegal application and administration of said National Labor Relations Act against these Petitioners directly resulting in the deprivation of their property and personal rights, which said application and administration of said Act are, under the Constitution of the United States and the Amendments thereto, illegal, unconstitutional, and void.

Eighteenth: Your Petitioners, moreover, respectfully show that said Decision and Direction of Election of said Board decided and determined a question and controversy between them and their opponent, aforesaid, the said Utility Workers Organizing Committee, and also between them and their employer, the said Consumers Power Company, finally affecting, prejudicing, and destroying, both immediately and in the future, the property and personal rights and the vital interests of your Petitioners, all directly and deeply involved in their right by ballot and election to choose, select, and designate their representative for collective bargaining, aforesaid, and finally subordinating their said rights and interests to the illegally preferred interests of said rival organization, the Utility Workers Organizing Committee; that said Decision and Direction of Election was passed with and for the final purpose of determining and settling the active dispute and contest between your Petitioners and said rival labor Organization, as to which of the two was lawfully entitled to represent and should represent the said employes,

in said unit, of said Consumers Power Company for the purpose of collective bargaining. That the actual immediate and future effect of said Decision and Direction of Election was, is, and shall be to evict and exclude your Petitioners entirely and finally from all and every possibility of being chosen or designated, by the employes in said appropriate unit in said election by ballot, as such collective bargaining representative, and utterly and finally to deprive them of all right upon their part to be a contestant or
15 candidate in said election for and of such representative; and, that, therefore, the said Decision and Direction of Election was and is in its substance, nature, operation, and effect in every respect, decisive, ultimate, and final with respect and relation to your Petitioners and all their paramount and vital rights and interests in the selection of representation for collective bargaining with their employer upon the supremely important subjects of rates of wages and hours and conditions of employment. The said Decision and Direction of Election, accordingly, was and is a final determination and order upon the part of said Board finally, adversely, and irretrievably deciding and disposing of the aforesaid rights, property, interests, security, and welfare of these Petitioners under said Act, and subjecting them to and entailing upon them, in those respects, final, permanent, and irreparable injury, loss, and damage, in violation of said Act as well as of the Constitution of the United States and the Amendments thereto.

Your Petitioners respectfully show that if the said Decision and Direction of Election of said National Labor Relations Board of March 1, 1939, aforesaid, be permitted to stand and be carried out in accordance with its terms and requirements, the rights and interests, including both their property and personal rights, of your Petitioners, hereinabove referred to, will be illegally, arbitrarily and in violation of the said Act and of the Constitution and its Amendments, denied them and annulled and destroyed, as a result whereof irreparable loss, injury and damage, for which they would be without remedy in a Court of law, would be sustained and suffered by them, which said unlawful, arbitrary and unconstitutional action upon the part of said Board, and which said loss, injury and damage, your Petitioners respectfully represent it is proper, just and required by virtue of said Act and Constitution for this Honorable Court to prohibit and prevent; and, further, that unless said final Decision and Direction of Election be set aside by this Honorable Court, as hereinafter prayed, permanent and irreparable injury to your Petitioners and to their property and personal rights and interests will be unavoidably imposed and inflicted upon them.

Wherefore, your Petitioners respectfully pray this Honor-
16 able Court to review the said Decision and Direction of Election entered and issued on March 1, 1939, by said National Labor Relations Board, and enter a Decree setting said Decision and Direction of Election aside as unauthorized, illegal, discriminatory, unconstitutional and void, and that, pending such Review

and Decree, said Decision and Direction of Election may be stayed and that such other and further decrees may be made herein as to this Honorable Court may seem just.

And as in duty bound, etc.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
By D. W. TRACY, *International President.*
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL UNION 876,
By W. B. PETTY,
Its International Representative and Business Manager.
ISAAC LORE STRAUS,
Munsey Building, Baltimore, Maryland;
SIGMUND LEVIN,
16 St. Paul Street, Baltimore, Maryland,
Solicitors for Petitioners.

17 [*Duly sworn to by D. W. Tracy; jurat omitted in printing.*]

Petitioners' Exhibit No. 1

FEBRUARY 11, 1939.

NATIONAL LABOR RELATIONS BOARD,
Shoreham Building, Washington, D. C.

Re: Consumers Power Company

Case No. R-1004

GENTLEMEN: International President D. W. Tracy of the International Brotherhood of Electrical Workers, and also Mr. W. B. Petty, International Representative of said Brotherhood at Grand Rapids, Michigan, have referred to me the communication dated February 8, 1939, of your Board, by its Secretary, Mr. Nathan Witt, stating that the Board has been notified by Utility Workers Organizing Committee that it desires the holding of a run-off election in the above case, and that the Board will direct the holding of a
18 run-off election unless objection thereto is received within five days from the date of the Board's said communication.

In the last preceding election held January 10–13, 1939, by direction of the Board, the employes of the Company were to determine whether they desired to be represented by the International Brotherhood of Electrical Workers, Local 876, affiliated with the American Federation of Labor, or by the Utility Workers Organizing Committee, affiliated with the Committee for Industrial Organization, or by Neither, and the ballot contained the name of the said C. I. O. organization, the name of the said I. B. E. W. Local Union, and also Neither. There were 2,977 eligibles, 52 ballots not counted, 11 ballots void, and 1 ballot blank; whilst 170 eligibles did not vote. The result of the election was declared to be as follows:

Utility Workers Organizing Committee (C. I. O.)	1,164
International Brotherhood of Electrical Workers, Local 876 (A. F. L.)	1,072
Neither	506

Of the three contestants in that election the C. I. O. Union and the I. B. E. W. Local Union, respectively, received the highest and the next highest number of votes, each of them receiving more than twice as many votes as the contestant, Neither.

On behalf of the International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers, Local Union 876, I am writing respectfully to say that they have no objection to the run-off election referred to in the Board's above-mentioned communication, if the contestants named upon the secret ballots used in the election be the two organizations, above named, which, respectively, received the highest and the next highest number of votes in the last-preceding election.

This condition is apposite and important with respect to the proposed run-off election, because intimations have been made, and rather widely circulated, by the Organization above named
19 affiliated with the C. I. O., that it only, or it and Neither, would appear upon the secret ballot, without the name of the I. B. E. W. Local Union 876 appearing at all, whereby the employes would be deprived of voting for the I. B. E. W. Local Union, and the "election" of a Collective Bargaining Agency to represent the employes of the Company would not be an election at all between the principal and real contestants who severally embrace decidedly the greater numbers and substantial body of the employes, and between whom the real contest for the choice of the Collective Bargaining Agency lies.

The International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers, Local Union 876, therefore, respectfully ask that said run-off election be held in the manner as hereinabove requested by them; and if it be so held, they have no objection to the same. If, however, the said election is not to be so held, or if I. B. E. W. Local Union 876 is not to appear upon the ballots to be used in said election as a contestant and candidate therein for Collection Bargaining Agency to represent employes of the Company, then the International Brotherhood of Electrical Workers and its said Local Union most respectfully and most decidedly object to the suggested run-off election, which, if so held, would utterly deny and deprive them of their rights to participate in an election for the choice of a Collective Bargaining Agency as provided for and secured to them by the National Labor Relations Act, as well as by their fundamental legal rights.

If the Board has any hesitancy or doubt about the propriety and justice of the above request of the International Brotherhood of Electrical Workers for its Local Union to appear upon the ballot in the run-off election in question, as above indicated, I would, on behalf of the International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers, Local Union 876,

respectfully ask a hearing by the Board thereupon at a date convenient to the Board.

If the run-off election be held, as above requested by the International Brotherhood of Electrical Workers and its said Local Union, they also respectfully ask that a revised eligibility list of employes as from August 29, 1938, to January 1, 1939, be set up and be furnished to them as well as to their opponent in the run-off election.

With great respect, I am,

Very truly yours,

ISAAC LOBE STRAUS,
General Counsel for International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers Local Union 876.

ILS:GK.

Petitioners' Exhibit No. 2

NATIONAL LABOR RELATIONS BOARD

(LETTERHEAD)

MARCH 1, 1939.

Mr. ISAAC LOBE STRAUS,
Munsey Bldg., Baltimore, Md.

Re: Consumers Power Company, Case No. R-1004

DEAR SIR: We are enclosing herewith a copy of the Board's Supplemental Decision and Second Direction of Election in the above-entitled case.

Very truly yours,

NATHAN WITT, *Secretary.*

NLRB 92.

21 United States of America

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. R-1004

IN THE MATTER OF CONSUMERS POWER COMPANY AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 876

SUPPLEMENTAL DECISION AND SECOND DIRECTION OF ELECTION

(March 1, 1939)

On November 8, 1938, the National Labor Relations Board, herein called the Board, issued a Decision and Direction of Election [1] in

[1] 9 N. L. R. B., No. 67.

the above-entitled proceedings. On November 23, 1938, and on December 22, 1938, the Board issued Amendments to its Decision and Direction of Election.[1] The Direction of Election, as amended, directed the Regional Director for the Seventh Region, acting as agent for the Board, and subject to National Labor Relations Board Rules and Regulations—Series 1, as amended, to conduct an election by secret ballot among all employees of Consumers Power Company, herein called the Company, excluding general and assistant foremen, plant supervisors, crew foremen, and other supervisory employees except as expressly included below, office employees, office building janitors and watchmen, collectors, connected load inspectors, electrical, mechanical, and civil engineers, efficiency men and junior engineers, draftsmen, surveyors, chemists, architects, temporary common laborers hired for a specific job and for not more than 6 months, part-time local service men and local service men who do not perform mechanical work in the regular course of employment, and storekeepers with supervisory powers who do not ordinarily do mechanical work, but including load dispatchers, meter readers, and bill distributors, plant janitors and watchmen, and storekeepers other than those excluded above, who were on the pay roll of the Company for the pay roll period next preceding August 29, 1938, except those who had since quit or been discharged for cause, to determine whether they desired to be represented by International Brotherhood of Electrical Workers, Local 876, herein called I. B. E. W., or by Utility Workers Organizing Committee, herein called U. W. O. C., for the purposes of collective bargaining, or by neither. The Direction, as amended, provided for the holding of the election within 70 days of the date of the original Decision and Direction of Election.

Pursuant to said Direction of Election, as amended, the Regional Director conducted an election by secret ballot from January 10 to January 13, 1939.

On January 21, 1939, the Regional Director caused to be served on the parties his Intermediate Report on the conduct of the ballot. No exceptions to the Intermediate Report have been filed by any of the parties. As to the results of the secret ballot, the Regional Director reported the following:

Total number of employees eligible	2,977
Total number of ballots cast	2,806
Total number of votes for International Brotherhood of Electrical Workers, Local 876	1,072
Total number of votes for Utility Workers Organizing Committee	1,134
Total number of votes for neither	506
Total number of challenged ballots	52
Total number of blank ballots	1
Total number of void ballots	11

[1] 9 N. L. R. B. No. 67a; 10 N. L. R. B. No. 65.

Upon the expiration of the period for filing exceptions to the Intermediate Report, the Regional Director forwarded it to the Board in Washington, D. C. Thereafter, the Board received a letter, dated January 31, 1939, from Allan S. Haywood, chair-
23 man of U. W. O. C., in which he requested that the Board certify U. W. O. C. as representative of the employees of the Company within the appropriate unit, on the basis of the election theretofore held. By letter dated February 4, 1939, the Secretary of the Board informed Haywood that such certification would not be in accordance with the policy established by the Board, where no union had received a majority of the votes validly cast in an election. By letters dated, respectively, February 2, 1939, and February 6, 1939, counsel for U. W. O. C. and the chairman thereof requested the Board to direct the holding of a run-off election among the employees of the Company, providing for a choice for or against U. W. O. C. By letters dated February 8, 1939, pursuant to a request which had been previously made by D. W. Tracy, International President of International Brotherhood of Electrical Workers, the Secretary of the Board notified the Company, I. B. E. W., and Tracy that the Board would direct the holding of a run-off election unless objection thereto was received within 5 days from the date of the letters. By letter dated February 11, 1939, counsel for I. B. E. W. informed the Board that it had no objection to the holding of a run-off election in which the name of I. B. E. W. was included on the ballot, but that it did object to the holding of any such election in which that organization's name was not so included. I. B. E. W. also requested a hearing before the Board for the purpose of oral argument concerning its right to appear on the ballot.

On February 24, 1939, pursuant to notice duly served upon I. B. E. W., U. W. O. C., and the Company, a hearing for the purpose of oral argument was held before the Board in Washington, D. C. I. B. E. W. and U. W. O. C. were represented by counsel and participated in the argument.

In Matter of Interlake Iron Corporation and Amalgamated Association of Iron, Steel, and Tin Workers of North America, Local No. 1657, 4 N. L. R. B. 55, the Board, in reaffirming its policy of providing a space on the ballot, in elections involving two or more rival unions, in which a voter may indicate that he does not desire either of the named unions to represent him, stated that, "In the event that the election in the present case results in none of the three preferences obtaining a majority of the votes cast, we will,
24 upon request of the labor organization receiving the greater number of votes, promptly direct a run-off election in which the ballot will allow employees the opportunity to vote for or against this organization." This policy has, since its formulation,

been consistently followed by the Board.[3] We have considered the questions raised in the I. B. E. W. letter of February 11, 1939, and the considerations advanced by counsel for I. B. E. W. at the oral argument, and find no reason to depart from our established practice in cases of this kind.

A majority of the employees of the Company in the appropriate unit have indicated a desire to bargain collectively with the Company, although they have accorded neither of the rival unions a majority. As noted above, U. W. O. C., which received the greater number of votes validly cast in the election, has requested the holding of a run-off election. The Board finds that the question concerning representation which has arisen can best be resolved by the holding of a run-off election in which the employees in the appropriate unit will be given the opportunity to decide whether or not they desire to be represented by U. O. W. C. We will so direct. In the holding of this election the Regional Director is expressly authorized to use the United States mail in the manner provided in the first Amendment to Decision and Direction of Election in this proceeding, except that the date fixed by the Regional Director for the return of mailed ballots shall not in any event be later than the expiration of the period within which balloting is to be conducted by him.

SECOND DIRECTION OF ELECTION

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 8, of National Labor Relations Board Rules and Regulations—Series 1, as amended, it is hereby

Directed that, as part of the investigation authorized by the Board to determine representatives for the purposes of collective bargaining with Consumers Power Company, Jackson, Michigan, an election by secret ballot shall be conducted within forty-five (45) days from the date of this Direction, under the direction and supervision of the Regional Director for the Seventh Region, acting in this matter as agent of the National Labor Relations Board, and subject to Article III, Section 9, of said Rules and Regulations, among all the employees of the Company, excluding general and assistant foremen; plant supervisors, crew foremen, and other supervisory employees except as expressly included below, office employees, office building janitors and watchmen, collectors, connected load inspectors, electrical, mechanical, and civil engineers, efficiency men and junior engineers; draftsmen, surveyors, chemists, architects, temporary common laborers hired for a specific job and for not more than 6 months, part-time local service men and local service

[3] Matter of Fedders Manufacturing Company and Lodge No. 1753, Amalgamated Association of Iron, Steel and Tin Workers of North America, through Steel Workers Organizing Committee, 4 N. L. R. B. 770; Matter of J. J. Little & Ives Company and Bindery Women's Union Local No. 43, 6 N. L. R. B. 411; Matter of [redacted] Nut House and United Cracker, Bakery & Confectionery Workers of America, 8 N. L. R. B., No. 52; and Matter of Unit Cast Corporation and Steel Workers Organizing Committee, 8 N. L. R. B., No. 101.

men who do not perform mechanical work in the regular course of employment, and storekeepers with supervisory powers who do not ordinarily do mechanical work, but including load dispatchers, meter readers, and bill distributors, plant janitors and watchmen, and storekeepers other than those excluded above, who were on the pay roll of the Company for the pay-roll period next preceding August 29, 1938, except those who have since quit or been discharged for cause, to determine whether or not they desire to be represented by Utility Workers Organizing Committee, for the purposes of collective bargaining.

Signed at Washington, D. C., this 1st day of March 1939.

[SEAL]

J. WARREN MADDEN, *Chairman.*
EDWIN S. SMITH, *Member.*
DONALD WAKEFIELD SMITH, *Member.*
National Labor Relation Board.

26 National Labor Relations Board envelope. Register No. 69140. Post Marked: Washington, March 2, 1939; Baltimore, March 3, 1939. Addressed to Mr. Isaac Lobe Strauss, Munsey Bldg., Baltimore, Md. Attached.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 8267

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876, PETITIONERS,

vs.

THE NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Filed Apr. 8, 1939. John W. Menzies, clerk.

Motion to the United States Circuit Court of Appeals for the Sixth Circuit, for stay of order of the National Labor Relations Board pending the final determination of a petition to review and set aside said order of the National Labor Relations Board

To the Honorable, The Judges of the the United States Circuit Court of Appeals for the Sixth Circuit:

International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers, Local Union 876, Petitioners in a Petition filed on the 5th day of April 1939, in this Honorable Court to Review and Set Aside the Decision and Direction of Election, or Order, of the National Labor Relations Board, issued and entered by said Board on March 1st, 1939, in said Petition more particularly referred to, respectfully move this Honorable Court to stay the said Order of Decision and Direction of Election, until and after the final determination of the matters and questions raised and presented by said Petition, and for grounds of said Motion your Petitioners respectfully show:

1. That they, as hereinabove stated, have petitioned this Honorable Court to Review and Set Aside a Decision and Direction of Election, or Order of the National Labor Relations Board, entered and issued on March 1, 1939, which said election the said Board and its Regional Director for the Seventh Region, decided and determined on the 15th day of March 1939, should be held on the 11th, 12th, 13th, and 14th days of April 1939.

2. That your Petitioners desire to obtain a stay of the said Order of the Board pending the final determination of the matters and questions, and particularly the question of the legality and validity of said Order and of any election purported to be held thereunder and pursuant thereto, raised by their Petition to Review and Set Aside.

3. That for the reasons set forth in an affidavit, hereunto attached as part hereof, of Isaac Lobe Straus, of Counsel for your Petitioners in said Petition and proceeding, in support of the Petitioners' said Motion for a Stay of said Order of said Board pending the final determination of the matters and questions aforesaid, and particularly for the reasons, among others, set forth in said affidavit, that if said Order of said Board of Decision and Direction of Election be not stayed and if said election be held on said April 11th, 12th, 13th, and 14th, 1939, as further ordered by said Board and its Regional Director for the aforesaid Seventh Region, in such event the said Order of Decision and Direction of said Election will have been completely and finally executed and carried out, and said election will have been actually, fully, and finally held, conducted, carried out, and completed, so as to render the said Petition to Review and Set Aside said Board's Order of Decision and Direction of Election utterly futile, abortive, and nugatory, and ipso facto conclude the said matters and questions of law against your Petitioners and finally dispose of and preclude them from their lawful rights and interests, relating to and involved in the same as particularly set forth in said Petition, and finally deprive them of any hearing in, or any consideration by this Honorable Court of their rights and interests in the premises, subjecting them finally and without relief and without posibility of relief to the deprivation and denial of their said rights and interests, and to their irreparable loss and injury, as stated in their said Petition.

Wherefore, your Petitioners move and pray this Honorable Court to pass an Order staying the said Decision and Direction of Election, or Order, of the National Labor Relations Board, of March 1, 1939, until and including a reasonable time from and after the final determination of the matters and questions raised in and by their aforesaid Petition.

And, they will ever pray, etc.

(S) Taft, Stettinius & Hollister,
(S) Isaac Lobe Straus,
(S) Sigmund Levin,

Solicitors for Petitioners, International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers, Local Union 876.

In the United States Circuit Court of Appeals for the Sixth Circuit

No. 8267

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876, PETITIONERS

vs.

THE NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Affidavit in support of motion for stay

STATE OF OHIO,
Hamilton County, ss:

I, Isaac Lobe Straus, with offices in the Munsey Building, Baltimore, Maryland, am of counsel for the Petitioners in the above-entitled proceeding in this Court, pursuant to Section 10 (f) and Section 8 (d) of the National Labor Relations Act, and am familiar with the matters and things therein involved and hereinafter stated.

2. The nature of the proceeding and the relief sought are fully set forth in the verified Petition for Review, which has been duly filed with the Clerk of this Court.

3. The above-named Petitioners, being aggrieved by a final Order, designated Decision and Direction of Election, of the National Labor Relations Board, dated March 1, 1939, ask a review and annulment of said Decision and Direction of Election, or Order, in which the said Board determined and ordered, among other things, that to determine representatives of the employees of the Consumers Power Company, the employer Company mentioned in said Petition for Review, for the purposes of collective bargaining with said Consumers Power Company, Jackson, Michigan, a run-off election by secret ballot be conducted within forty-five days from the date of said Decision and Direction of Election, or Order, under the direction and supervision of the Regional Director of said Board for the Seventh Region, among all the employees of said Company, with certain enumerated exceptions, to determine whether or not they desired to be represented by Utility Workers Organizing Committee, an Affiliate of the Congress for Industrial Organization, for the purposes of collective bargaining; that subsequent to said Decision and Direction of Election, or Order, of the Board, of March 1, 1939, it was on March 15, 1939, further ordered and directed that such election, in the manner and form as aforesaid, be conducted and held on April 11, 12, 13, and 14, 1939.

4. Compliance with the said Decision and Direction of Election, or Order, of the National Labor Relations Board and the carrying out and execution of said Order, by holding and conducting the said run-off election in substance, manner, and form specified and required

by said Decision and Direction of Election, or Order, of said Board, and particularly the conduct and holding of said election in substance, manner, and form aforesaid, on April 11, 12, 13, and 14, 1939, as directed and required as aforesaid, and before this Honorable Court may or shall have, or might or shall have had, any opportunity to consider, act upon, or render any judgment or decree, upon or pursuant to said Petition of the International Brotherhood of Electrical Workers and the International Brotherhood of Electrical Workers, Local Union No. 876, to Review and Set Aside said Order, would conclusively and finally deprive the Petitioners, whose membership embraces and includes employees of said Consumers Power Company eligible to vote in said run-off election, of the benefits, protection, security, and relief designed by said Act in their behalf and in the general public interest, in that the Petitioner, International Brotherhood of Electrical Workers, Local Union 876, would be eliminated and omitted from the ballot to be used in an election held in the manner and form ordered and directed to be held as aforesaid. That the elimination and omission of the name of the said Petitioner, International Brotherhood of Electrical Workers, Local Union 876, from said ballot as aforesaid, would restrict the elective franchise and right of suffrage invested in the membership of the said Petitioners, and guaranteed to it and them by the National Labor Relations Act, to the exercise of a mere right to vote for or against a single designated candidate other than the said Petitioners; and that, unless the said Decision and Direction of Election, and the run-off election directed and required to be conducted and held pursuant to its provisions, and in the manner and form aforesaid, is, by this Honorable Court, stayed, pending the final determination of the matters and questions raised in behalf of the Petitioners in their aforesaid Petition to Review and Set Aside the said Decision and Direction of Election, the said highly important and valuable property and personal rights of the Petitioners will be finally affected, prejudiced, and destroyed without any hearing upon or consideration by this Honorable Court of said Petition, to the final and the irreparable injury and damage of said Petitioners; and if said order of said Board of Decision and Direction of Election be not stayed, and if said election be held on said April 11, 12, 13, and 14, 1939, as further ordered, as aforesaid, by said Board through its Regional Director for the aforesaid Seventh Region, in such event the said Order of Decision and Direction of Election will have been completely and finally executed and carried out, and said election will have been actually, fully, and finally held and ended, so as to render said Petition to Review and Set Aside said Board's said Order of Decision and Direction of Election, utterly futile, abortive and nugatory, and, ipso facto, predetermine and conclude the said matters and questions of law against your Petitioners and finally dispose of and preclude them from their lawful rights and interests relating to and involved in the same, as particularly set forth in said Petition, and finally deprive them of any hearing of, and any consideration by, this

Honorable Court of their rights and interests in the premises, subjecting them finally and without relief, and without possibility of relief, to the deprivation and denial of their said rights and interests and to irreparable loss and injury as stated in their said Petition.

5. The Federal Anti-Injunction Act (Act of March 23, 1932, c. 90, 47 Stat. 70, U. S. Code, Title 29, Section 101, et seq.), commonly known as the Norris-LaGuardia Act, does not limit or affect the jurisdiction of this Honorable Court, particularly when sitting in equity, to give relief requested under the terms of the National Labor Relations Act. Section 10 (h) of the National Labor Relations Act provides:

"When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,' approved March 23, 1932 (U. S. C., Supp. VII, title 29, Secs. 101–115)."

6. No other or previous application for this or similar relief has been made to any Court or Judge.

(S) ISAAC LOBE STRAUS,
Isaac Lobe Straus,
Affiant.

Subscribed to and sworn to before me, a Notary Public in and for Hamilton County, Ohio, this 8th day of April 1939.

[SEAL] (S) JOHN W. HUDSON,
John W. Hudson,
Notary Public in and for
Hamilton County, State of Ohio.

In the United States Circuit Court of Appeals for the Sixth Circuit

No. 8267

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 876, PETITIONERS

vs.

THE NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Opposition to application for stay

Filed April 10, 1939

To the Honorable, the JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT:

Now comes the National Labor Relations Board, by its attorneys, and opposes the application of the petitioners herein for a stay of

the Supplemental Decision and Second Direction of Election issued by the National Labor Relations Board on March 1, 1939, in In the Matter of Consumers Power Company, and International Brotherhood of Electrical Workers, Local 876, Case No. R–1004. The grounds of such opposition are set forth in the Motion to Dismiss filed herein by the National Labor Relations Board, a copy of which is attached hereto.

(S) ROBERT B. WATTS,
Associate General Counsel.
(S) DAVID C. SHAW,
(S) PHILLIP G. PHILLIPS,
Attorneys for Respondent,
National Labor Relations Board.

April 7, 1939.
Receipt acknowledged.
TAFT, STETTINIUS & HOLLISTER,
By JOHN H. CLIPPINGER,
Attys. for Petitioners.
April 8, 1939.

[Copy]

In the United States Circuit Court of Appeals for the Sixth District

No. 8267

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876, PETITIONERS

vs.

THE NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Motion to dismiss

Filed April 10, 1939

To the Honorable, the JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT:

Now comes the National Labor Relations Board, hereinafter referred to as the Board, by its attorneys, and moves the court, to dismiss the petition to review and set aside the Board's Supplemental Decision and Second Direction of Election issued March 1, 1939, and to deny petitioner's application for a stay of the Board's proceedings, and for its grounds respectfully states as follows:

1. A petition having been filed alleging that a question affecting commerce had arisen concerning representation of employees and requesting an investigation and certification of representatives, the Board on November 8, 1938, pursuant to Section 9 (c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. A. Sections 151, et seq.), duly issued a Decision and Direction of Election, a copy of which is attached hereto, marked "Exhibit A" and made a part hereof,

in the proceeding before it entitled, "In the Matter of Consumers Power Company, and International Brotherhood of Electrical Workers Local 876"—Case No. 2-1004. On November 23, 1938, and on December 22, 1938, the Board issued amendments to its said Decision and Direction of Election, copies of which are attached hereto, marked "Exhibit B," and made a part hereof. Thereafter the Board, on March 1, 1939, pursuant to Section 9 (c) of the National Labor Relations Act, duly issued a Supplemental Decision and Second Direction of Election, a copy of which is attached hereto, marked "Exhibit C," and made a part hereof.

2. Thereafter, on April 5, 1939, the International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers Local Union 876, petitioners herein, filed in this court a petition to review and set aside said Supplemental Decision and Second Direction of Election. Said petition requested, among other things, that this court enter an order herein staying the said Supplemental Decision and Second Direction of Election until the final determination of the petition to review and set aside.

3. The Jurisdiction of the United States Circuit Courts of Appeals is obtained solely by virtue of the Acts of Congress. The National Labor Relations Act is the only Act of Congress which grants jurisdiction to the United States Circuit Courts of Appeals to review actions of the Board, and which contains provisions for such review. Review is accordingly limited to the provisions of that act.

4. No record of the proceeding, certified by the Board, having been filed with this Court, this Court has no jurisdiction to grant any relief to petitioners.

5. This Court has no jurisdiction to entertain the petition herein, or to grant the prayers thereof. Sections 10 (e) and 10 (f) are the only sections of the National Labor Relations Act granting jurisdiction to the Circuit Courts of Appeals to review actions of the Board. Of these, Section 10 (e) applies solely to reviews sought by the Board.

6. Section 10 (f), as well as 10 (e), applies only to the review of orders of the Board issued under Section 10 (c) of said Act, requiring employers to cease and desist from unfair labor practices prohibited by Section 8. The action of the Board in the matter now sought to be reviewed did not relate to any alleged unfair labor practice under Section 8 of the Act, did not and could not lead to any cease and desist order under Section 10 (c) of said Act, relating to such unfair labor practices, and in no way comes within the limited review afforded with respect to cease and desist orders of the Board, by Section 10 (f) of the Act.

7. This Court has no jurisdiction to entertain the petition herein, or grant the prayers thereof, because the Second Direction of Election was duly issued by the Board pursuant to a proceeding under Section 9 (c) of the Act, a purely fact-finding investigation resulting in no order or compulsion against any one, and reviewable only as expressly provided in Section 9 (d) of the Act, in connection with

a cease and desist order issued under Section 10 (c) of said Act. No such cease and desist order has or could have been made in the investigation proceeding which the Board is conducting.

8. The legislative history of the Act makes it clear that "their shall be no right to court review anterior to the holding of an election." In its report on the bill, the Senate Committee on Education and Labor stated:

"Section 9 (c) empowers the National Labor Relations Board, whenever a question affecting commerce arises concerning the representation of employees, to conduct an investigation either by secret ballot or otherwise to determine such representatives. In any such investigation, an appropriate hearing must be held.

"Section 9 (d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election. An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees. There is no more reason for court review prior to an election than for court review prior to a hearing. But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with the elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully revisable by any aggrieved party in the Federal Courts in the manner provided for in Section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action of the Board." (74th Cong., 1st Sess., Senate Report No. 573, p. 14.)

The report of the House Committee on Labor is to the same effect:

"As previously stated in this report, the efficacy of Public Resolution 44 has been substantially impaired by the provision for court review of election orders prior to the holding of the election. Section 9 (d) of the bill makes clear that there is to be no court review prior to the holding of the election, and provides an exclusive, complete, and adequate remedy whenever an order of the Board made pursuant to Section 10 (c) is based in whole or in part upon facts certified following an election or other investigation pursuant to Section 9 (c). The hearing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard. Since the certification and the record of the investigation are required to be included in the transcript of the entire record filed pursuant to Section 10 (e) or (f), the Baord's actions and determinations of fact and law in regard thereto will be subject to the same court review as is provided for its other determinations under Sections 10 (b) and 10 (c)." (74th Cong., 1st Sess., House Report No. 1147, p. 23.)

9. Section 9 (d) of the National Labor Relations Act provides that whenever an order involving an unfair labor practice shall be made by the Board under Section 10 (c) based upon facts certified

following an investigation under 9 (c), and there is a petition to enforce or review such order made under Section 10 (c) the decree of the Court shall be made and entered on the transcript of the record of the entire proceeding, which shall include the certification and the record of the investigation under 9 (c).

10. Section 9 (d) does not provide for the judicial review of the proceedings under 9 (c); Section 9 (d) clearly shows that proceedings undertaken pursuant to Section 9 (c), the type involved herein, may be judicially reviewed only when the Board has issued a cease and desist order in an unfair labor practice case under 10 (c) and furthermore, only when such cease and desist order is based upon facts certified by the Board pursuant to an investigation under 9 (c).

11. The Board has not issued any cease and desist order against the petitioner, or other parties to the proceedings before it, under Section 10 in respect to any unfair labor practice. Until such order is issued, based upon the proceedings here involved, there can be no jurisdiction in this Court to review.

12. The Second Direction of Election involved herein does not require anyone, petitioner or others, to do anything or refrain from doing anything. It is not, therefore, an Order, final or otherwise. It is merely an intermediate step in an investigation being conducted pursuant to Section 9 (c) of the National Labor Relations Act. As a result of such investigation, the Board may or may not certify the name or names of employee representatives. Such certification of fact, if made by the Board, would be merely an announcement or statement of the results of its research and investigation as to what representative or representatives have been designated or selected by the particular employees concerned. Such an announcement or statement of fact is not in any sense an order.

13. This Court having no jurisdiction to review the Second Direction of Election, it likewise, for the same reasons, has no jurisdiction to grant the stay of the Second Direction of Election requested by petitioner.

Wherefore, the Board respectfully moves that the petition, to review and set aside the Board's Supplemental Decision and Second Direction of Election, and requesting a stay of the proceedings before the Board, be dismissed.

(S) ROBERT B. WATTS,
Associate General Counsel,
(S) DAVID C. SHAW,
(S) PHILLIP G. PHILLIPS,
Attorneys for respondent,
National Labor Relations Board.

Dated April 7, 1939.
Receipt acknowledged.

TAFT, STETTINIUS & HOLLISTER,
By J. H. CLIPPINGER,
Attys. for Petitioners.

163642—39——2

Exhibit A

United States of America

Before the National Labor Relations Board

IN THE MATTER OF CONSUMERS POWER COMPANY AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 876

Case No. R-1004.—Decided November 8, 1938

Electric and Gas Utility Industry—Investigation of Representatives: controversy concerning representation of employees: rival organizations; employer's refusal to grant recognition of union—Unit Appropriate for Collective Bargaining: all employees except supervisory and office employees, technical employees, and temporary common laborers, but including crew foremen, janitors and watchmen, and meter readers and bill distributors; form of self-organization; history of collective bargaining in industry as a whole—Election Ordered: labor organization which was found to be company-dominated in Decision of even date, excluded from ballot.

Mr. Charles F. McErlean, for the Board.

Bisbee, McKone, Badgley & Kendall, by Mr. Don T. McKone, and Mr. Walter D. Kline, of Jackson, Mich., for the Company.

Padway, Goldberg & Terrell, by Mr. A. G. Goldberg, of Milwaukee, Wis., for I. B. E. W.

Mr. Maurice Sugar, of Detroit, Mich. for U. W. O. C.

Mr. Frank C. Painter, of Jackson, Mich., for the Independent.

Mr. Joseph B. Robison, of counsel to the Board.

DECISION AND DIRECTION OF ELECTION

STATEMENT OF THE CASE

On February 2, 1938, International Brotherhood of Electrical Workers, Local 876, herein called I. B. E. W., filed with the Regional Director for the Seventh Region (Detroit, Michigan) a petition alleging that a question affecting commerce had arisen concerning the representation of employees of Consumers Power Company, Jackson, Michigan, herein called the Company, and requesting an investigation and certification of representatives pursuant to Section 9 (c) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. On August 12, 1938, the National Labor Relations Board, herein called the Board, acting pursuant to Section 9 (c) of the Act and Article III, Section 3, of National Labor Relations Board Rules and Regulations—Series 1, as amended, ordered an investigation and authorized the Regional Director to conduct it and to provide for an appropriate hearing upon due notice.

On August 18, 1938, the Regional Director issued a notice of hearing, copies of which were duly served upon the Company, I. B. E. W., Independent Power Employees' Association, herein called the Independent, and Utility Workers Organizing Committee, herein called U. W. O. C., the latter two being organizations claiming to represent employees directly affected by the investigation.[2] Pursuant to the notice, a hearing was held on August 29 and 30, 1938, at Detroit, Michigan, before Tilford E. Dudley, the Trial Examiner duly designated by the Board. The Board, the Company, I. B. E. W., U. W. O. C., and the Independent were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties.

At the commencement of the hearing, U. W. O. C. moved to intervene as a party in the proceeding. The motion was granted. The Independent made a similar motion, which was denied on the ground that the Independent was already a party by virtue of the fact that it was named in the petition. U. W. O. C. reserved its right to object to further participation by the Independent in this proceeding in the event that the Board held that that organization was company-dominated.[3] The Company made a motion to dismiss the proceeding on various jurisdictional and constitutional grounds. The motion was denied. The Company renewed the motion at the end of the hearing, at which time the Trial Examiner reserved decision. All parties were given 10 days from the end of the hearing to request oral argument before the Board. During the course of the hearing the Trial Examiner made several rulings on other motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner, including the rulings described above, and finds that no prejudicial errors were committed. The rulings are hereby affirmed. The motion on which the Trial Examiner reserved decision is hereby denied.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. The Business of the Company

Counsel for the Board, the Company, and I. B. E. W. entered into a stipulation whereby certain portions of the record in Case No.

[2] On February 2, 1938, a charge was filed by Local 740 United Electrical, Radio & Machine Workers of America, herein called the United, in *Matter of Consumers Power Company, a corporation, and Local No. 740, United Electrical, Radio & Machine Workers of America*, Case No. C-790, alleging that the Company had engaged in unfair labor practices affecting commerce, within the meaning of the Act. In a Decision and Order of even date with the instant Decision (9 N. L. R. B., No. 66), the Board found that the Company had dominated and interfered with the formation and administration of the Independent and had contributed support to it, and ordered the Company to cease and desist from such domination, interference, and support, and to refrain from recognizing the Independent as representative of any of its employees.

[3] See footnote 1, *supra*.

C–790 [1] were incorporated in the record in the instant proceeding. The stipulation was accepted by U. W. O. C. and the Independent. In a Decision in Case No. C–790, of even date with this Decision, certain findings of fact with regard to the operations of the Company are made, which are based on the portions of the record referred to in the stipulation. The findings of fact in Case No. C–790, entitled "I. The business of the respondent," are hereby incorporated in this Decision and are made a part of the Findings of Fact herein.

II THE ORGANIZATIONS INVOLVED

International Brotherhood of Electrical Workers is a labor organization affiliated with the American Federation of Labor. Local 876 thereof admits to membership electrical workers who are employees of the Company. It is divided into several branches on a geographical basis.

Utility Workers Organizing Committee is a labor organization affiliated with the Committee for Industrial Organization, herein called the C. I. O., admitting to membership employees of the Company.

Independent Power Employees' Association is an unaffiliated labor organization, which admits to membership employees of the Company.

III. THE QUESTION CONCERNING REPRESENTATION

It was stipulated by all parties that I. B. E. W., U. W. O. C., and the Independent each represents a substantial number of the Company's employees. I. B. E. W. has been organizing employees of the Company since the beginning of 1937. The Company had a contract with predecessor organizations of U. W. O. C. which was executed on June 8, 1937. The latest extension of this contract expired on September 4, 1938. All these labor organizations claim to represent all of the employees in an appropriate bargaining unit, and these claims have been called to the attention of the Company. The Company is of the opinion that none of them represents a majority. I. B. E. W. contends that an election should be held to determine representatives for the purposes of collective bargaining. U. W. O. C. denies that such an election is necessary. Counsel for the Company stated that it had no objection to the holding of an election. We find that a question has arisen concerning representation of employees of the Company.

IV. THE EFFECT OF THE QUESTION CONCERNING REPRESENTATION UPON COMMERCE

We find that the question concerning representation which has arisen, occurring in connection with the operations of the Company

[1] See footnote 1, supra.

described in Section I above, has a close, intimate, and substantial relation to trade, traffic, commerce, transportation, and communication among the several States, and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE APPROPRIATE UNIT

It was agreed by all parties that a single unit composed of employees throughout the Company's entire system is appropriate for the purposes of collective bargaining. It was also agreed by stipulation at various points in the hearing that the following groups of employees should be excluded from the unit: office employees; salesmen; collectors, including those listed by the Company in its "credit and collections" departments; connected load inspectors; electrical, mechanical, and civil engineers; efficiency men and junior engineers; draftsmen; surveyors; chemists; architects; temporary common laborers hired for a specific job and for not more than 6 months; part-time local service men and local service men or agents who do not perform mechanical work in the regular course of employment; and storekeepers with supervisory powers who do no mechanical work. As to the last two categories, U. W. O. C. agreed to the exclusions contained in the stipulation, but contended that they were not broad enough. U. W. O. C. also contended that certain other groups, as described below, should be excluded. It was agreed that the exclusion of temporary common laborers was not to exclude seasonal employees. We see no reason for not excluding from the appropriate unit any of the categories of employees whose exclusion was agreed upon by the parties. We consider now the groups concerning which there is dispute, all of which U. W. O. C. wishes to exclude, and I. B. E. W. to include, in the appropriate unit. Since, as a result of our Decision and Order in Case No. C-790,[4] the Independent's claim for certification is to be disregarded, we do not consider the contentions as to the appropriate unit advanced by it.

Crew foremen.—Crew foremen are clearly supervisory employees. They direct the work of crews of from 2 to 10 men working away from headquarters on electric lines, gas mains, and the like. They have great responsibility and are consulted with regard to raises, promotions, and demotions, of the men under them. There is evidence that on some occasions they have exercised the power to discharge. The Company considers them to be supervisory employees and believes they should be excluded.

Despite the clearly supervisory nature of the duties of the crew foremen, however, we believe they should not be excluded from the appropriate unit. In case of curtailment of the Company's pay roll, they may lose their status as crew foremen and become simply members of the remaining crews. I. B. E. W. admits them to membership. U. W. O. C. and its predecessors likewise admitted them to

[4] See footnote 1, supra.

membership and attempted to bargain for them. It is clear that the crew foremen were excluded from the contracts between the Company and the C. I. O. unions solely because the Company demanded their exclusion. This was over the express opposition of the C. I. O. representatives. U. W. O. C. still numbers crew foremen among its membership. It contends that the fact that they were excluded from the contract prevented U. W. O. C. from inducing other crew foreman to join. We do not consider this argument persuasive for their exclusion. Representatives of U. W. O. C. admitted that if the crew foremen had not been excluded from the contract they would now have no objection to their inclusion in the appropriate unit. U. W. O. C. has a contract with at least one other power company which covers foremen. Finally, it is the established practice of I. B. E. W. to include foremen among its membership, to bargain for them, and to include them in its contracts.

The fact that certain employees have duties of a clearly supervisory nature does not necessarily preclude their inclusion in a bargaining unit, where, as here, it is the established practice in the industry to include them, and that practice has been recognized, as to employees of the Company in question, by the labor organizations involved. We will include crew foremen in the appropriate unit.

Plant supervisors.—The Company employs shift supervisors, who are in charge of a particular plant during one shift, and turbine-room and boiler-room supervisors, who direct the work in parts of plants, under the direction of shift supervisors. Shift supervisors do no manual work, but turbine-room and boiler-room supervisors do a limited amount of such work. A representative of the Company testified that the authority of the latter is parallel to that of the crew foremen. It appears in addition that they are in charge of substantial properties of the Company.

It thus appears that, as in the case of crew foremen, the plant supervisors have duties of a clearly supervisory nature. However, although I. B. E. W. admits them to membership, U. W. O. C. does not. Thus the case of plant supervisors differs from that of crew foremen in that U. W. O. C. does not admit the former, and has not tried to bargain for them. We will consequently adhere to our usual practice of excluding minor supervisory employees, where one of the participating labor organizations desires such exclusion.

Other supervisory employees.—There is no stipulation excluding supervisory employees generally from the unit. Such employees are eligible to membership in I. B. E. W., but not in U. W. O. C. U. W. O. C. wishes to exclude such employees from the appropriate unit, and I. B. E. W. is willing to exclude general foremen. In the absence of evidence that supervisory employees generally should be included, we will follow our usual practice and exclude them from the appropriate unit, except as specifically noted. As used hereinafter, the term, supervisory employees, means employees who have the power to hire or discharge or the power to recommend hiring or discharg-

ing, and includes general foremen, assistant foremen, plant supervisors, and all other employees above the rank of crew foremen.

Load dispatchers.—Load dispatchers have positions of considerable responsibility, and receive high salaries. Their work is not supervisory, however, since no employees work under their direction. They direct the output of the Company's various plants regarding the turning on and off of plants and adjusting loads. They anticipate load requirements and the water supply for hydraulic production. Finally, they control the Company's private communications system. The Company considers them close to management and supervision.

I. B. E. W. contends that the work of load dispatchers is merely that of switchboard operators. While it appears that their duties are of a responsible nature, we do not believe that the record shows that they should be excluded from the appropriate unit.

Meter readers and bill distributors.—Meter readers and bill distributors perform the functions their names suggest. Their duties are partly clerical, and consist otherwise of the labor of travelling from one customer to another. To some extent their work is interchangeable. Bill distributors receive lower pay than meter readers. Both work out of offices and are part of the customers' accounting department. They require no training, and although they advance most commonly into the office staff, there is nothing about their work which prepares them for either office or manual work with the Company. The Company considers them outside workers.

Both U. W. O. C. and I. B. E. W. admit meter readers and bill distributors to membership, and both have included them in contracts with other electric power companies. U. W. O. C. contends, however, that they should be excluded here because, at the insistence of the Company, they were excluded from the contracts above mentioned.

In view of the established practice of both unions here involved, and the fact that the inclusion of meter readers and bill distributors in the appropriate unit is not unreasonable, they will be included.

Janitors and watchmen.—The Company employs watchmen and janitors in office buildings and in service buildings and plants. As used herein, plant janitors and watchmen will include service building janitors and watchmen. U. W. O. C. contends that office janitors and office watchmen should be excluded. The Company contends that all watchmen should be excluded. I. B. E. W. desires the inclusion of all these groups.

We fail to see any merit in the Company's contention that the nature of the duties of the watchmen is so confidential as to require their exclusion from the appropriate unit. It appears that in some cases, the duties of watchmen and janitors may be combined in a single employee. Moreover, the watchmen are not segregated in a separate department, but work under the direction of the supervisor of the building in which they are stationed. Both unions admit

plant watchmen to membership and desire their inclusion in the appropriate unit.

We sustain the contention of U. W. O. C. with regard to office janitors and watchmen, although they are eligible to membership in both I. B. E. W. and U. W. O. C. While the duties of these employees do not differ from those of the plant watchmen and foremen, they do not come in contact with other employees who are included in the appropriate unit. Since office employees are being excluded from the unit, we will also exclude office janitors and watchmen.

Local service men.—As noted above, it was stipulated that the local service men to be excluded from the appropriate unit should include at least those who do not perform mechanical work in the regular course of employment. U. W. O. C. desires to include in the unit only those local service men who have no supervisory powers, and who devote a substantial part of their time to mechanical work.

Local service men are representatives of the Company operating in communities which are out of reach of those towns in which the Company has established operating headquarters. Their duties are to take care of any matters affecting the Company which they can handle. They receive and transmit applications for service. They turn customers' service on and off. In some cases they read meters. They make minor repairs and in some cases work even on energized lines. Finally, in case of an emergency requiring additional help, they may hire temporary employees and supervise their work.

The record shows that some local service men have joined U. W. O. C. and that U. W. O. C. has tried to bargain for them in the past. We see no reason for excluding any local service men other than those whose exclusion was agreed on.

Storekeepers.—During the course of the hearing the parties agreed to the exclusion of storekeepers with supervisory powers who do not ordinarily do mechanical work. The record does not clearly show whether U. W. O. C. maintained its position that other storekeepers should be excluded.

The work of storekeepers varies from those who are in charge of large storerooms, who do little or no mechanical work, and who have power to hire and discharge, to others who have no assistants and who do other work such as that of timekeepers or pay-roll clerks. A representative of the Company stated that he considered that those whose work was largely clerical should be excluded and that those whose work was largely manual should be treated as operating employees.

We see no reason for excluding any storekeepers other than those whose exclusion was agreed upon.

We find that all the employees of the Company, excluding general and assistant foremen, plant supervisors, and other supervisory employees except as expressly included below, office employees, office building janitors and watchmen, collectors, connected load inspectors,

electrical, mechanical, and civil engineers, efficiency men and junior engineers, draftsmen, surveyors, chemists, architects, temporary common laborers hired for a specific job and for not more than 6 months, part-time local service men and local service men who do not perform mechanical work in the regular course of employment, and storekeepers with supervisory powers who do not ordinarily do mechanical work, but including crew foremen, load dispatchers, meter readers and bill distributors, plant janitors and watchmen, and storekeepers other than those excluded above, constitute a unit appropriate for the purposes of collective bargaining and that said unit will insure to employees of the Company the full benefit of their right to self-organization and to collective bargaining and otherwise effectuate the policies of the Act.

VI. THE DETERMINATION OF REPRESENTATIVES

It is not contended that either of the labor organizations here involved can be certified without the holding of an election, nor is there any evidence in the record on which such a certification could be based. Hence we find that the question concerning representation which has arisen can best be decided by holding an election by secret ballot. Since we have held in a decision of even date [5] that the Independent has been dominated, interfered with, and supported by the Company, its name will not appear on the ballot.

At the hearing all parties but U. W. O. C. agreed that in the event an election was directed by the Board, employees of the Company on the pay roll of July 31, 1938, should be eligible to participate. Counsel for U. W. O. C. reserved judgment, and thereafter expressed no opinion. Counsel for the Company stated that he was informed that the pay roll would not change materially for 2 or 3 months. No reason was offered for the selection of July 31. We will therefore direct that employees within the appropriate unit, who were on the pay roll of the Company for the pay-roll period next preceding the date of the commencement of the hearing, August 29, 1938, will be eligible to vote.

Upon the basis of the above findings of fact and upon the entire record in the case, the Board makes the following:

Conclusions of Law

1. A question affecting commerce has arisen concerning the representation of employees of Consumers Power Company, Jackson, Michigan, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

2. All the employees of the Company, excluding general and assistant foremen, plant supervisors, and other supervisory employees except as expressly included below, office employees, office building

[5] See footnote 1, supra.

janitors and watchmen, collectors, connected load inspectors, electrical mechanical, and civil engineers, efficiency men and junior engineers, draftsmen, surveyors, chemists, architects, temporary common laborers hired for a specific job and for not more than 6 months, part-time local service men and local service men who do not perform mechanical work in the regular course of employment, and storekeepers with supervisory powers who do not ordinarily do mechanical work, but including crew foremen, load dispatchers, meter readers, and bill distributors, plant janitors and watchmen, and storekeepers other than those excluded above, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

Direction of Election

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 8, of National Labor Relations Board Rules and Regulations—Series 1, as amended, it is hereby

Directed that, as part of the investigation authorized by the Board to determine representatives for the purposes of collective bargaining with Consumers Power Company, Jackson, Michigan, an election by secret ballot shall be conducted within forty-five (45) days from the date of this Direction, under the direction and supervision of the Regional Director for the Seventh Region, acting in this matter as agent of the National Labor Relations Board, and subject to Article III, Section 9, of said Rules and Regulations, among all the employees of the Company, excluding general and assistant foremen, plant supervisors, and other supervisory employees except as expressly included below, office employees, office building janitors and watchmen, collectors, connected load inspectors, electrical, mechanical, and civil engineers, efficiency men and junior engineers, draftsmen, surveyors, chemists, architects, temporary common laborers hired for a specific job and for not more than 6 months, part-time local service men and local service men who do not perform mechanical work in the regular course of employment, and storekeepers with supervisory powers who do not ordinarily do mechanical work, but including crew foremen, load dispatchers, meter readers, and bill distributors, plant janitors and watchmen, and storekeepers other than those excluded above, who were on the pay roll of the Company for the pay-roll period next preceding August 29, 1938, except those who have since quit or been discharged for cause, to determine whether they desire to be represented by International Brotherhood of Electrical Workers, Local 876, or by Utility Workers Organizing Committee, for the purposes of collective bargaining, or by neither.

Exhibit B

United States of America

Before the National Labor Relations Board

IN THE MATTER OF CONSUMERS POWER COMPANY and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 876

Case No. R-1004

AMENDMENT TO DECISION AND DIRECTION OF ELECTION

November 23, 1938

On November 8, 1938, the National Labor Relations Board, herein called the Board, issued a Decision and Direction of Election [1] in the above-entitled proceedings. The Board hereby amends its Decision by adding, after the second paragraph of Section VI, the following paragraph:

"We will direct the election to be held under the direction and supervision of the Regional Director for the Seventh Region, who shall determine in his discretion the exact times, places, and procedure for giving notice of the elections and for balloting. We expressly authorize the use of the United States mail for such purposes and the use of agents, if feasible, to journey through the Company's various territorial divisions to conduct elections at appropriate places, collecting the votes in sealed containers for delivery to the Regional Director. In providing for the taking of ballots by mail, the Regional Director shall specify the date by which envelopes containing returned ballots must be mailed. Ballots returned in envelopes postmarked at a later date shall not be counted. Each employee who is permitted to vote by mail shall be notified of the date by which he must mail his ballot. The date so fixed by the Regional Director shall not in any event be later than January 7, 1939." [2]

The Board hereby amends its Direction of Election by striking therefrom the words, "within forty-five (45) days from the date of this Direction," and substituting therefor the words "within sixty (60) days from the date of this Direction."

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[1] 9 N. L. R. B., No. 67.

[2] See *Matter of Pacific Gas and Electric Company* and *United Electrical & Radio Workers of America*, 3 N. L. R. B. 835; and *Matter of Pacific Greyhound Lines* and *Brotherhood of Locomotive Firemen and Enginemen*, 4 N. L. R. B. 520.

United States of America

Before the National Labor Relations Board

IN THE MATTER OF CONSUMERS POWER COMPANY and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 876.

Case No. R–1004

Unit Appropriate for Collective Bargaining: crew foremen, minor supervisory employees, excluded, because of participation in unfair labor practices by Company.

SECOND AMENDMENT TO DECISION AND DIRECTION OF ELECTION

December 22, 1938

On November 8, 1938, the National Labor Relations Board, herein called the Board, issued a Decision and Direction of Election [1] in the above-entitled proceedings. Utility Workers Organizing Committee, herein called U. W. O. C., filed a motion, dated November 22, 1938, to amend the Decision and Direction of Election by excluding crew foremen, load dispatchers, meter readers, and bill distributors, and certain local service men from the unit found to be appropriate and from participation in the election directed by the Board; to incorporate in the record of this case the record and findings in Matter of Consumers' Power Company, a corporation, and Local No. 740, United Electrical, Radio & Machine Workers of America, Case No. C–790; [2] to provide an opportunity for a voter to vote for either of the unions appearing on the ballot without expressing a choice between them; to grant oral argument upon the above matters; to permit the filing of briefs in support of the motion; and to postpone the election, if necessary. Consumers Power Company, herein called the Company, filed an answer to this motion, dated November 28, 1938, in which it objected to the taking of any action by the Board which would delay the holding of an election in this matter. On November 29, 1938, the Board issued an order, copies of which were served on all of the parties, in which it denied the motion of U. W. O. C., except in so far as it concerned the question of the exclusion of crew foremen from the appropriate unit and from participation in the election.[3] The order also directed the Regional Director for the Seventh Region to segregate the ballots of the crew foremen and to keep them segregated and uncounted until a further order concerning their disposition was made by the Board.

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[1] 9 N. L. R. B., No. 67. An Amendment to the Decision and Direction of Election was issued on November 23, 1938, 9 N. L. R. B., No. 67a. The amendment dealt with the manner of conducting the election.

[2] 9 N. L. R. B., No. 66.

[3] The Company's answer was received by the Board in Washington, D. C., after the above-described order was issued.

On November 29, 1938, the Board also issued a notice of hearing before the Board in Washington, D. C., on December 12, 1938, for the purpose of oral argument concerning the question of crew foremen. Copies of the notice of hearing were served upon the Company, U. W. O. C., and International Brotherhood of Electrical Workers, Local 876, herein called the I. B. E. W. These three parties were likewise granted until December 12, 1938, to file briefs.

Pursuant to the notice, a hearing was held before the Board at Washington, D. C., on December 12, 1938. I. B. E. W. and U. W. O. C. were represented by counsel and participated in the argument. U. W. O. C. filed a brief which the Board has considered.

The Board, having considered the matter, hereby grants the motion of U. W. O. C. to exclude crew foremen from the unit found to be appropriate and from participation in the election. Accordingly, the Board hereby amends its Decision as follows:

The subsection entitled "Crew foremen" of Section V of the Findings of Fact is omitted, and the following substituted therefor:

"Crew foremen are clearly supervisory employees. They direct the work of crews of from 2 to 10 men working away from headquarters on electric lines, gas mains, and the like. They have great responsibility and are consulted with regard to raises, promotions, and demotions of the men under them. There is evidence that on some occasions they have exercised the power to discharge. In case of curtailment of the Company's pay roll, however, they may lose their status as crew foremen and become simply members of the remaining crews. The Company considers them to be supervisory employees and believes that they should be excluded.

"I. B. E. W. admits crew foremen of the Company to membership. It is the established practice of I. B. E. W. in the industry generally to include foremen, to bargain for them, and to include them in the coverage of its contracts. U. W. O. C. and its predecessors likewise admitted crew foremen to membership and attempted to bargain for them. It is clear that the crew foremen were excluded from the contracts between the Company and the C. I. O. unions solely because the Company demanded their exclusion. This was over the express opposition of the C. I. O. representatives. Although the first contract between the Company and U. W. O. C., excluding crew foremen, was entered into in June 1937, U. W. O. C. attempted to have these employees included as recently as February 1938.

"U. W. O. C. still numbers some crew foremen among its membership, although many who were formerly members have dropped out or have ceased paying dues. Crew foremen are no longer sought as members by U. W. O. C., which contends that it has been unable to induce them to join because of their exclusion from the contract. Representatives of U. W. O. C. admitted, however, that if the crew foremen had not been excluded from the contract they would now have no objection to their inclusion in the appropriate unit. U. W. O. C. has a contract with at least one other power company which covers foremen.

"In addition to the facts stated above, we take notice of the facts found by us in our Decision in Case No. C-790.[a] We there found that crew foremen of the Company had been instrumental in the commission by the Company of certain unfair labor practices. The findings include the following:

"'Thus, from the testimony of executive officers, as well as the employees themselves, it is clear that the respondent has conferred power upon its crew foremen which enables them effectively to coerce the employees and to interfere with their right to self-organization.

"'As described above, Markle, Parker, Sheets, and McDonald possess even greater supervisory powers than the crew foremen. The latter, looking to them for guidance, unquestionably charted their activities against the C. I. O. and in support of the Independent in accordance with the course so clearly defined by their superiors.'

"In an earlier Decision[b] an important consideration in determining the propriety of excluding minor supervisory employees from an appropriate unit was stated as follows:

"'The subforemen and group leaders belong to a class of minor supervisory employees whose inclusion in or exclusion from a unit made up of production workers must depend largely upon the particular facts in each case. Where, as here, there is a history of rivalry among labor organizations claiming to represent employees, it is important that the employer be free from the imputation of coercing his employees in their choice of representatives. Since subforemen and group leaders are in some measure identified with management, it is not improbable that their participation in a controversy between rival unions will lead to charges of employer interference. We will, therefore, exclude subforemen and group leaders, as well as general foremen, from the unit.'

"It has been our practice to exclude minor supervisory employees where one of the participating labor organizations desires such exclusion. Although U. W. O. C. has admitted crew foremen and has attempted to bargain for them in the past, we believe that the activities of crew foremen on behalf of the Company, as found by us in Case No. C-790 to have occurred, justify the present position of U. W. O. C. We will accordingly exclude crew foremen from the appropriate unit."

The second paragraph of the subsection entitled "Plant supervisors" of Section V of the Findings of Fact is amended so that it will read as follows:

"It thus appears that, as in the case of crew foremen, the plant supervisors have duties of a clearly supervisory nature. I. B. E. W. admits them to membership, but U. W. O. C. does not. We will consequently adhere to our usual practice of excluding minor supervisory employees, where one of the participating labor organizations desires such exclusion."

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[a] See footnote 1, supra.
[b] Matter of Rex Manufacturing Company, Inc. and A. F. of L. Federal Local Union No. 20893, 7 N. L. R. B. 95.

The subsection entitled "Other supervisory employees" of Section V of the Findings of Fact is amended by altering the last sentence thereof so as to read as follows:

"As used hereinafter, the term, supervisory employees, means employees who have the power to hire or discharge or the power to recommend hiring or discharging, and includes general foremen, assistant foremen, plant supervisors, crew foremen, and all other employees whose status is similar to or superior to that of crew foremen."

The last paragraph of Section V of the Findings of Fact is amended to read as follows:

"We find that all the employees of the Company, excluding general and assistant foremen, plant supervisors, crew foremen, and other supervisory employees except as expressly included below, office employees, office building janitors and watchmen, collectors, connected load inspectors, electrical, mechanical, and civil engineers, efficiency men and junior engineers, draftsmen, surveyors, chemists, architects, temporary common laborers hired for a specific job and for not more than 6 months, part-time local service men and local service men who do not perform mechanical work in the regular course of employment; and storekeepers with supervisory powers who do not ordinarily do mechanical work, but including load dispatchers, meter readers and bill distributors, plant janitors and watchmen, and storekeepers other than those excluded above, constitute a unit appropriate for the purposes of collective bargaining and that said unit will insure to employees of the Company the full benefit of their right to self-organization and to collective bargaining and otherwise effectuate the policies of the Act."

The second conclusion of law is amended by inserting after the words, "plant supervisors," the words, "crew foremen," and by omitting after the words, "but including," the words, "crew foremen."

The Board hereby amends its Direction of Election by inserting after the words, "plant supervisors," the words, "crew foremen," and by omitting after the words, "but including," the words, "crew foremen."

In our Order of November 29, 1938, we directed the Regional Director for the Seventh Region to segregate and keep uncounted the ballots of crew foremen. The Regional Director is hereby directed not to receive any ballots from crew foremen of the Company in the election in this proceeding and to disregard any ballots already cast by such crew foremen.

The Acting Regional Director having notified the Board that additional time is required for the holding of the election, the Board hereby amends its Direction of Election, as amended, by striking therefrom the words, "within sixty (60) days from the date of this Direction" and substituting therefor the words, "within seventy (70) days from the date of this Direction."

(Supplemental Decision and Second Direction of Election, March 1, 1939, omitted in printing. It appears on page 21, supra.)

42
50

United States Circuit Court of Appeals—Sixth Circuit

No. 8267

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET AL.

vs.

THE NATIONAL LABOR RELATIONS BOARD

Before HICKS, SIMONS, and ALLEN, JJ.

The Petitioners, having filed in the office of the Clerk of this Court their Petition verified April 4, 1939, for the Review and Setting Aside of the final Order of the National Labor Relations Board, designated Decision and Direction of Election, entered and issued March 1, 1939, and the Petitioners having made application, by way of Motion, to the court, supported by the affidavit of their Counsel, Isaac Lobe Straus, Esquire, vertified April 8, 1939, for a Stay of Decision and Direction of Election of the National Labor Relations Board pending the hearing and determination of said Petition for Review by this Court and the entry of an Order or Decree thereon,

It is, this tenth day of April 1939, by the United States Circuit Court of Appeals for the Sixth Circuit, ordered that, pending the hearing and determination of said petition for Review by this Court and the entry of an Order or Decree thereon, the said Order, designated Decision and Direction of Election of the National Labor Relations Board, dated March 1, 1939, be and hereby is in all respects stayed.

Approved for entry:

(S) XEN HICKS,
Circuit Judge.

Filed April 10, 1939.
A true copy.
Attest:

J. W. MENZIES,
Clerk, U. S. Circuit Court of Appeals, Sixth Circuit.

United States Circuit Court of Appeals for the Sixth Circuit

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of motion of petitioners for stay of order of National Labor Relations Board; opposition to application for stay; motion of Board to dismiss petition to review and exhibits attached thereto in the case of International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers.

Local Union 876 vs. The National Labor Relations Board, No. 8267, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 10th day of July, A. D. 1939.

J. W. MENZIES,
Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.

Proceedings in the United States Circuit Court of Appeals for the Sixth Circuit

Cause argued and submitted

May 10, 1939

Before HICKS, SIMONS, and ALLEN, JJ.

This cause is argued by Isaac L. Straus and John H. Clippinger for Petitioners and by Philip G. Phillips for Respondent and is submitted to the Court.

Order

Entered June 28, 1939

On Petition to Review and Set Aside an Order of the National Labor Relations Board.

This cause came on to be heard on the transcript of record from the National Labor Relations Board, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged that the "Second Directions of Election" ordered by the National Labor Relations Board on March 1, 1939, be and the same is set aside.

Opinion

Filed June 28, 1939

United States Circuit Court of Appeals, Sixth Circuit

No. 8267

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876, PETITIONERS

v.

THE NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On petition to review and set aside an order of the National Labor Relations Board, entered and issued March 1, 1939, in the matter of Consumers Power Company and International Brotherhood of Electrical Workers, Local Union 876

Filed June 28, 1939. John W. Menzies, clerk.

Decided June 28, 1939

Before HICKS, SIMONS, and ALLEN, Circuit Judges

HICKS, Circuit Judge. International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers, Local Union 876, filed their petition in this court to review and set aside a Supplemental Decision and Second Direction of Election issued by The National Labor Relations Board. The Board moved to dismiss the petition upon the ground that this court has no jurisdiction to entertain it. A transcript of the proceedings before the Board sufficient for present purposes has been filed.

Petitioners aver that Local Union 876 is an organization of wage workers and a constituent of I. B. E. W. and that both organizations are affiliated with the American Federation of Labor; that Local Union 876 is composed of wage workers in the employ of Consumers Power Company, a public utility corporation.

On February 2, 1938, I. B. E. W. filed with the Regional Director a petition alleging that a question affecting commerce had arisen concerning the representation of employees of the Company and requesting an investigation and certification of representatives for collective bargaining.

Pursuant to Sec. 9 (c) of the National Labor Relations Act, the Board directed an investigation and authorized a hearing which was participated in by petitioners and the Utilities Workers Organizing Committee, another labor organization composed of employees of the Company and affiliated with the Congress for Industrial Organization. Both these organizations claimed to represent the employees of the Company.

The Board found that a question affecting commerce had arisen concerning the representation of the Company's employees and directed that an election by secret ballot be conducted under the super-

vision of the Regional Director to determine whether the employees desired to be represented by the I. B. E. W. or by the U. W. O. C. or by neither. The Regional Director conducted the election and reported to the Board the results as follows:

Total Number of Employees Eligible	2,977
Total Number of Ballots Cast	2,806
Total Number of Votes for I. B. E. W.	1,072
Total Number of Votes for U. W. O. C.	1,164
Total Number of Votes for Neither	503
Total Number of Challenged Ballots	52
Total Number of Blank Ballots	1
Total Number of Void Ballots	11

The result indicated that a majority of the voters desired to bargain collectively but that neither organization had received a majority of the votes cast. Thereupon, over the protest and objection of petitioners, the Board promulgated what is styled a "Supplemental Decision and Second Direction of Election." The Board directed "that as a part of the investigation authorized by the Board to determine representatives for the purposes of collective bargaining with Consumers Power Company * * * an election by secret ballot shall be conducted * * * among all the employees of the Company, excluding * * * to determine whether or not they desire to be represented by Utility Workers Organizing Committee for the purposes of collective bargaining."

It is this "Second Direction of Election" which petitioners seek to have reviewed and set aside. We are not concerned here with unfair labor practices as between employer and employee set out in Sec. 10 of the Act. We are dealing with the procedure for the designation of representatives of employees for purposes of collective bargaining, described in Sec. 9, a concededly different matter. It is the policy of the United States, set forth in the third paragraph of Sec. 1 of the Act, to encourage the practice and procedure of collective bargaining and to protect the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment, or other mutual aid or protection. In Labor Board v. Greyhound Lines, 303 U. S. 261, the court, at page 265, said:

"The history of the Act and its language show that its ruling purpose was to protect interstate commerce by securing to employees the rights established by § 7 to organize, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for that and other purposes. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 23, 33. This appears both from the formal declaration of policy in § 1 of the Act, National Labor Relations Board v. Jones & Laughlin Steel Corp., supra, 22–24, and from § 7, in itself a declaration of the policy which, in conjunction with § 10 (c), it adopts as the controlling guide to administrative action."

Section 7 of the Act guarantees to employees the right to bargain collectively through representatives of their own choosing and to engage in concerted activities, for the purposes of collective bargaining or other mutual aid or protection. Associated Press v. Labor Board, 301 U. S. 103, 123; Labor Board v. Jones & Laughlin, 301 U. S. 1, 33. It was said in the Jones & Laughlin case that this is a fundamental right. See also Texas & N. O. R. Co. v. Railway Clerks, 281 U. S. 548, 571.

Having made the guaranty, it was necessary that the Congress should adopt a procedure for the selection of such representatives. To this end, Sec. 9 (a) provides that representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining, etc. There is thus provided the simple American principle of majority rule. Virginian Ry. Co. v. System Federation No. 40, etc., 84 Fed. (2d) 641, 652 (C. C. A. 4).

By Sec. 9 (c) it is provided that whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. This section further provides that the Board may take a secret ballot of employees to ascertain such representatives.

The order complained of purports to have been promulgated under this section. We think the order was illegal and that the proposed election was unfair in effect. It was in the teeth of the policy formulated in the statute, that the employees should be protected in the exercise of full freedom of designation of representatives of their own choosing. The employee was not given full freedom of choice. If he voted he could either ratify or reject the nominee of the Board but if he rejected it he was through. He had no alternative—he could not choose for himself. He could take the representative offered him or none at all—a parallel of Hobson's choice.

Moreover, the order violates the "majority rule" provided by Sec. 9 (a). The intention of this section is that a majority of those voting should select their representatives. If a majority should indicate by their ballots that they did not desire to be represented by the U. W. O. C., nothing has been accomplished. No selection of representatives has been made and collective bargaining falls, notwithstanding that in the first election 2,238 out of 2,806 voters indicated their desire for collective bargaining. The purpose of the election was to select, not to reject, representatives. Nothing more need be said touching the invalidity of the order.

Respondent urges that the Act makes no provision for judicial review in the instant case; that petitioners' right of review is by Sec. 9 (d) to be held in abeyance until a final order in an unfair labor practice controversy [Sec. 10 (a)], which in some degree or manner

involves petitioners' complaint, comes up for review. But there is no controversy here over labor practices as between the Company and its employees. Indeed, it is not shown that any such controversy exists. It may never arise, or if it should, it may never be presented here.

In this situation, does this court have jurisdiction to review the order complained of, which as we have pointed out, destroys the right of petitioners, guaranteed by Sec. 7 of the Act, in the exercise of full freedom to bargain collectively with the Company through representatives of their own choosing? We think it does. We cannot think that the Congress overlooked this important matter. The right of employees to choose their own representatives for collective bargaining was generally recognized and conceded long before it was guaranteed by the National Labor Relations Act. (See the discussion in Labor Board v. Jones & Laughlin, 301 U. S. at page 33.) This essential property right was not only guaranteed but was safeguarded; otherwise the Act itself would be subject to serious inquiry as to whether it violates the due process clause of the Fifth Amendment.

Section 10 (f) provides—

"Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business * * * by filing in such court a written petition praying that the order of the Board be modified or set aside."

Petitioners are "persons" as defined in Section 2 (1) of the Act. They reside and transact business in this circuit. For the reasons above indicated they are justly aggrieved by the order of the Board complained of, which denied to them their rights under Sections 7 and 9 of the Act.

Respondents insist that the order is not final but it was final not only in its effect but in that it was the last order to be made under the procedure set out in the Act for the determination of representatives of employees for the purposes of collective bargaining with the Company. It is true that if the election had been held it was the duty of the Board to certify the result; but a certificate is not an order.

Finally, it is said that the phrase "wherein the unfair labor practice in question was alleged to have been engaged in" found in Sec. 10 (f) limits the right of judicial review of procedure involving unfair labor practices only, as described in Sec. 10 of the Act. It certainly permits a review of the procedure in such character of controversy but does not confine it thereto.

The Supreme Court did not so limit it in Edison Co. v. Labor Board, 305 U. S. 197, 226. See also the discussion touching jurisdiction under Sec. 10 (f) found in In re Labor Board, 304 U. S. 486,

493; and in Ford Motor Co. v. Labor Board, 305 U. S. 364, 369. While the case is before the court upon respondent's motion to dismiss for lack of jurisdiction, yet it has nevertheless been fully briefed and argued upon the merits. The facts are not disputed and we think that our conclusion as to the jurisdictional question necessarily concludes the controversy.

It is therefore ordered that the order complained of be and the same is set aside.

United States Circuit Court of Appeals for the Sixth Circuit

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of Petition to Review and Set Aside Order of the National Labor Relations Board and Exhibits Thereon, and transcript of proceedings in U. S. C. C. A., in the case of International Brotherhood of Electrical Workers et. al. vs. National Labor Relations Board, No. 8267, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 30th day of June, A. D. 1939.

J. W. Menzies,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

U. S. GOVERNMENT PRINTING OFFICE 1939

57 Supreme Court of the United States

Order allowing certiorari

Filed October 9, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, and the case is assigned for argument immediately following No. 70.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

[Endorsement on cover:] File No. 43660. United States Circuit Court of Appeals, Sixth Circuit. Term No. 253. National Labor Relations Board, petitioner, vs. International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers, Local Union 876. Petition for a writ of certiorari and exhibit thereto. Filed August 1, 1939. Term No. 253 O. T. 1939.

U. S. GOVERNMENT PRINTING OFFICE 1939

FILE COPY

AUG 1 1939
CHARLES ELMORE CROPLEY
CLERK

No. 253

In the Supreme Court of the United States

OCTOBER TERM, 1939

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered on June 28, 1939, setting aside a second direction of election issued by the Board ordering a run-off election in the case entitled "*In the Matter of Consumers Power Company and International Brotherhood of Electrical Workers, Local 876,*" 11 N. L. R. B., No. 63, March 1, 1939.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 52–56) is not yet reported. The "Decision and

Direction of Election" (R. 36–44) issued by the Board on November 8, 1938, is reported in 9 N. L. R. B. 742, and the "Supplemental Decision and Second Direction of Election" (R. 21–25), issued by the Board on March 1, 1939, is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 28, 1939 (R. 51). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a direction of election issued by the National Labor Relations Board in a proceeding under Section 9 (c) of the National Labor Relations Act is reviewable by a circuit court of appeals under Section 10 (f) of the Act.

2. If the answer to the first question is in the affirmative, there is presented the question whether, after an election in which two competing labor organizations were placed on the ballot and a place was also provided for the employees to vote against representation by either of said organizations, in which election neither of the competing organizations obtained a majority of the votes cast, it is an abuse of discretion for the Board to conduct a run-off election in which the name of the organization receiving the smaller number of votes in the first election is dropped from the ballot, so that the employees may vote for or against the organization

receiving the greater number of votes in the first election.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, U. S. C. Supp. IV, Title 29, Section 151 *et seq.*) are set forth in the Appendix, *infra*, pp. 21–28.

STATEMENT

On February 2, 1938, the International Brotherhood of Electrical Workers, Local 876 (I. B. E. W.), respondent here, filed with the Regional Director of the Board at Detroit, Michigan, a petition alleging that a question affecting commerce had arisen concerning the representation of employees of Consumers Power Company, Jackson, Michigan (hereinafter called the Company), and requesting an investigation and certification of representatives for collective bargaining pursuant to Section 9 (c) of the Act. The Board, on August 12, 1938, authorized the Regional Director to conduct an investigation and to provide for an appropriate hearing upon notice. Pursuant to notice, a hearing was held on August 29 and 30 at Detroit, Michigan, before a Trial Examiner. Both the I. B. E. W. and th Utility Workers Organizing Committee (U. W. O. C.), which also claimed to represent employees of the Company, were represented by counsel and participated in the hearing. On November 8, 1938, after opportunity for oral argument before the

Board (R. 37), of which the parties did not avail themselves, the Board issued a Decision and Direction of Election (R. 36–44). The Board found that a question affecting commerce had arisen concerning the representation of the Company's employees, and pursuant to the authorization contained in Section 9 (c) of the Act so to do, directed that as part of the investigation an election by secret ballot should be conducted under the direction and supervision of the Regional Director to determine whether the Company's employees, with certain exceptions not here relevant, desired to be represented by the I. B. E. W., by the U. W. O. C., or by neither of said organizations (R. 44).

Thereafter, from January 10 to January 13, 1939, the Regional Director conducted such election by secret ballot, as required by the Board's Direction of Election and amendments (R. 45–49) thereto. On January 21, 1939, the Regional Director served on the parties his Intermediate Report on the conduct of the ballot. No exceptions to the Intermediate Report were filed (R. 22). The Report showed the results of the secret ballot to be as follows (R. 5, 22):

Total Number of Employees Eligible	2,977
Total Number of Ballots Cast	2,806
Total Number of Votes for I. B. E. W.	1,072
Total Number of Votes for U. W. O. C.	1,164
Total Number of Votes for Neither	506
Total Number of Challenged Ballots	52
Total Number of Blank Ballots	1
Total Number of Void Ballots	11

Upon the expiration of the period for filing exceptions to the Intermediate Report, the Regional Director forwarded it to the Board in Washington. Thereafter, by letter dated January 31, 1939, the chairman of the U. W. O. C. requested that the Board certify the U. W. O. C. as representative of the employees (R. 22–23). By letter dated February 4, 1939, the Secretary of the Board replied that such certification would not be in accordance with the principle established by the Board that no representative is certified which has not received a majority of the votes cast in an election (R. 23). By letters dated February 2, 1939, and February 6, 1939, counsel for the U. W. O. C. and the chairman thereof requested the Board to direct the holding of a run-off election providing for a choice for or against the U. W. O. C., which had received a plurality of the votes in the January election (R. 23). The Secretary of the Board, by letters dated February 8, 1939, notified the parties that the Board would direct the holding of a run-off election unless objection was received within five days (R. 23, 5). By letter dated February 11, 1939, counsel for the I. B. E. W. informed the Board that it had no objection to the holding of a run-off election in which the I. B. E. W. would be included on the ballot, but that it did object to the holding of any run-off election in which that organization's name would not be included, and requested oral argument before the Board concerning its right to

appear on the ballot (R. 23, 17–19). The latter request was granted and oral argument was had before the Board on February 24, 1939, by counsel for the I. B. E. W. and counsel for the U. W. O. C. (R. 23, 8).

On March 1, 1939, the Board issued its Supplemental Decision and Second Direction of Election, now sought to be reviewed (R. 21–25). In this decision the Board stated (R. 23–24):

> In *Matter of Interlake Iron Corporation* and *Amalgamated Association of Iron, Steel, and Tin Workers of North America, Local No. 1657*, 4 N. L. R. B. 55, the Board, in reaffirming its policy of providing a space on the ballot, in elections involving two or more rival unions, in which a voter may indicate that he does not desire either of the named unions to represent him, stated that, "In the event that the election in the present case results in none of the three preferences obtaining a majority of the votes cast, we will, upon request of the labor organization receiving the greater number of votes, promptly direct a run-off election in which the ballot will allow employees the opportunity to vote for or against this organization." This policy has, since its formulation, been consistently followed by the Board. We have considered the questions raised in the I. B. E. W. letter of February 11, 1939, and the considerations advanced by counsel for I. B. E. W. at the oral argument, and find no

reason to depart from our established practice in cases of this kind.

A majority of the employees of the Company in the appropriate unit have indicated a desire to bargain collectively with the Company, although they have accorded neither of the rival unions a majority. As noted above, U. W. O. C., which received the greater number of votes validly cast in the election, has requested the holding of a run-off election. The Board finds that the question concerning representation which has arisen can best be resolved by the holding of a run-off election in which the employees in the appropriate unit will be given the opportunity to decide whether or not they desire to be represented by U. W. O. C. We will so direct. * * *

The Board accordingly directed that a run-off election by secret ballot should be conducted within forty-five days, under the supervision of the Regional Director, to determine whether or not the employees desired to be represented by the U. W. O. C. (R. 24–25). On March 15, 1939, the Board directed that the run-off election be conducted on April 11, 12, 13, and 14, 1939 (R. 27, 29).

On April 5, 1939, the I. B. E. W. filed its petition in the court below to review and set aside the Board's Supplemental Decision and Second Direction of Election (R. 1–17). It also applied for a stay pending a determination of its peti-

tion for review (R. 27–31). On April 10, 1939, the Board filed its opposition to the application for a stay (R. 31–32) and a motion to dismiss the petition for review for lack of jurisdiction (R. 32–35). After oral argument, the court, on April 10, 1939, granted the I. B. E. W.'s application for a stay of the election pending the hearing and determination of its petition for review (R. 50). On May 10, 1939, the case was heard by the court on the Board's motion to dismiss, but the merits of the case were also briefed and argued (R. 51). On June 28, 1939, the court handed down its decision, in which it held that it had jurisdiction to review the Board's Supplemental Decision and Second Direction of Election and, on review thereof, held that the Board had acted unlawfully in excluding the I. B. E. W. from the run-off ballot (R. 52–56). The court ordered that the "order complained of be * * * set aside" (R. 56, 51).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that it had jurisdiction to review the Board's proceedings in this case.

2. In holding that the Board had acted unlawfully in directing that the name of respondents not be included on the ballot in the run-off election.

3. In setting aside the Board's Supplemental Decision and Second Direction of Election.

REASONS FOR GRANTING THE WRIT

I

The decision of the court below sustaining its jurisdiction in this case is in conflict with the decisions of other courts of appeals. The question was directly presented in *Unlicensed Employees of Sabine Transportation Co.* v. *National Labor Relations Board,* decided November 12, 1937 (C. C. A. 5th) (reported in C. C. H., Labor Law Service, p. 16,040), in which the Board's motion to dismiss the petition for lack of jurisdiction was granted without opinion.[1] The decision is also in conflict with the holding in *Cupples Co., Manuf'rs* v. *National Labor Relations Board,* 103 F. (2d) 953, 955 (C. C. A. 8th), that the direction of election there involved was not reviewable under Section 10 (f). There is also a conflict with the decision of the Court of Appeals for the District of Columbia in *American Federation of Labor* v. *National Labor Relations Board,* 103 F. (2d) 933, pending on petition for writ of certiorari, No. 70, October Term, 1939, and with the decision of the Circuit Court of Appeals for the Third Circuit in *United Employees Association* v. *National Labor Relations Board,* 96 F. (2d) 875 (C. C. A. 3d). In

[1] The decision is also contrary to that reached by the court below in a previous case, *Combustion Engineering Co.* v. *National Labor Relations Board,* 95 F. (2d) 996. There a motion by the Board to dismiss for lack of jurisdiction a petition similar to the present one, was granted without opinion.

each of these cases the court held that the courts of appeals are without jurisdiction under the Act to review certifications issued by the National Labor Relations Board. If a certification—the final step in a representation proceeding—is not reviewable, a direction of election, which is a preliminary instruction by the Board to its own subordinate officials to take certain proceedings as part of the investigation concerning representation, *a fortiori*, is not reviewable.

II

The question involved is one of great importance in the administration of the National Labor Relations Act. A large proportion of the matters presented to the Board are questions concerning representation arising under Section 9 (c) of the Act.[2] If the decision below is correct, undoubtedly numerous suits will be instituted to review directions of the Board in representation cases, and the ultimate decision in such cases will inevitably be delayed for long periods of time. If the decision below is incorrect, and is reversed, this will not occur, and the vital controversies concerning representation may be disposed of without such delays.

We believe that the decision below on the question of jurisdiction is contrary to the terms of the

[2] In the year covered by the Board's most recent annual report, the Board ordered elections in 258 cases and issued a total of 342 certifications. *Third Annual Report of the National Labor Relations Board*, p. 40.

Act. The memorandum filed by the Government in *American Federation of Labor* v. *National Labor Relations Board*, No. 70, *supra*, contains an analysis of the provisions of the statute. We respectfully refer the Court to that analysis. We there point out that the jurisdiction of the circuit courts of appeals to review orders of the Board rests entirely upon Section 10 (f) of the Act and is limited to "orders" which are "final" and which are made solely in proceedings relating to unfair labor practices. The argument applies here even more clearly. A direction of election such as that involved in this case possesses none of the requisites of orders reviewable by the circuit courts of appeals under the statutory provisions governing review. It is not an order either in form or substance, but is a direction that, as part of the investigation concerning representation authorized by the Board, an election by secret ballot be conducted under the supervision of the Board's Regional Director.[2] If regarded as an order, within the meaning of the statute, which we think it is not, it is plainly interlocutory and not final, since no legal

[2] The Second Direction of Election, insofar as is pertinent here, reads as follows (R. 24–25):

"By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 8, of National Labor Relations Board Rules and Regulations—Series 1, as amended, it is hereby

"DIRECTED that, as part of the investigation authorized by the Board to determine representatives for the purposes of

consequences could ensue prior to the election, certification, and further order entered in an unfair labor practice proceeding. Thus, an attempt to review the Second Direction of Election in this case is more premature by two steps than the effort to review a certification rejected in the *American Federation of Labor* and *United Employees Association* cases, *supra*, pp. 8–9.

The legislative history referred to in the memorandum for the Government in the *American Federation of Labor* case shows that Congress, in enacting Sections 9 (d) and 10 (f), was particularly desirous of avoiding review of Board decisions in representation cases prior to the holding of an election. The immediate legislative predecessor of the National Labor Relations Act was Public Resolution No. 44, 73d Cong., 2d Sess. (48 Stat. 1183, approved June 19, 1934). Under that Resolution, the old National Labor Relations Board was em-

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collective bargaining with Consumers Power Company, Jackson, Michigan, an election by secret ballot shall be conducted within forty-five (45) days from the date of this Direction, under the direction and supervision of the Regional Director for the Seventh Region, acting in this matter as agent of the National Labor Relations Board, and subject to Article III, Section 9, of said Rules and Regulations, among all the employees of the Company, * * *, who were on the pay roll of the Company for the pay-roll period next preceding August 29, 1938, except those who have since quit or been discharged for cause, to determine whether or not they desire to be represented by Utility Workers Organizing Committee, for the purposes of collective bargaining."

powered to hold elections, and orders issued by the Board were expressly made reviewable in the circuit courts of appeals. The manner in which this provision operated to render the Resolution ineffective is described in the report of the House committee recommending the passage of the National Labor Relations Act (H. Rept. 1147, 74th Cong. 1st Sess., pp. 6–7):

> The weakness of this procedure is that under the provision for review of election orders employers have a means of holding up the election for months by an application to the circuit court of appeals. Thus, in the *Firestone* and *Goodrich cases*, where the Board ordered elections in November 1934, the cases were not argued in the circuit court of appeals until April; decisions have not yet been rendered, and if the decisions happen to be favorable to the Board, the companies will undoubtedly appeal to the Supreme Court, with further inevitable delay. At the present time 10 cases for review of the Board's election orders are pending in the circuit courts of appeals. Only three have been argued and none have been decided.
>
> *The election is but a preliminary determination of fact, and there is no reason why employers should have an opportunity for court review prior to the holding of the election.* The ability of employers to block elections has been productive of a large measure of industrial strife. When an employee organization has built up its membership to

> a point where it is entitled to be recognized as the representative of the employees for collective bargaining, and the employer refuses to accord such recognition, the union, unless an election can promptly be held to determine the choice of representation, runs the risk of impairment of strength by attrition and delay while the case is dragging on through the courts, or else is forced to call a strike to achieve recognition by its own economic power. Such strikes have been called when election orders of the National Labor Relations Board have been held up by court review.
>
> In the *Firestone* and *Goodrich cases,* strikes were imminently threatened, and were only averted at the last minute by appeals to the men to await the decisions of the court on the election orders. * * * [Italics supplied.]

The report of the Senate Commission on Education and Labor, S. Rept. 573, 74th Cong., 1st Sess., pp. 5–6, declares that:

> Under Public Resolution 44, any attempt by the Government to conduct an election of representatives may be contested *ab initio* in the courts, although such election is in reality merely a preliminary determination of fact. This means that the Government can be delayed indefinitely before it takes the first step toward industrial peace. After almost a year not a single case, in which a company has chosen to contest an election

order of the Board, has reached decision in any circuit court of appeals.

The committee reports make it plain that Congress intended to remedy this weakness in Public Resolution No. 44. The Senate Report (p. 14) declares that:

> *Section 9 (d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election. An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees. There is no more reason for court review prior to an election than for court review prior to a hearing.* But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by any aggrieved party in the Federal courts in the manner provided in section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action by the Board. [Italics supplied.]

The House Report similarly states (p. 23):

> As previously stated in this report, the efficacy of Public Resolution 44 has been substantially impaired by the provision for

court review of election orders prior to the holding of the election. *Section 9 (d) of the bill makes clear that there is to be no court review prior to the holding of the election,* and provides an exclusive, complete, and adequate remedy whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an election or other investigation pursuant to section 9 (c). The hearing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard. Since the certification and the record of the investigation are required to be included in the transcript of the entire record filed pursuant to section 10 (e) or (f), the Board's actions and determinations of fact and law in regard thereto will be subject to the same court review as is provided for its other determinations under sections 10 (b) and 10 (c). [Italics supplied.]

The position adopted by the court below would bring on the very consequences which Congress deliberately and in the light of past experience sought to avoid when it drafted the National Labor Relations Act. The court below was accordingly without jurisdiction of the cause.

III

The question as to the manner in which the Board should conduct a run-off election is also important. If the court below had jurisdiction to review the Board's Supplemental Decision and

Second Direction of Election, it is submitted that the court's decision on the merits is erroneous and should be reversed.

The practice of the Board in cases in which two organizations appear on the ballot, along with a place for the "neither" vote, and in which neither organization has received a majority of the votes cast in an election, has been to hold a run-off election, if requested by the union receiving a plurality, in which the employees may vote for or against representation by the organization obtaining a plurality.* The reason for this procedure is stated in the Board's decision in *In the Matter of Inter-*

* *In the Matter of Milwaukee Publishing Co.*, 10 N. L. R. B., No. 29, 11 N. L. R. B., No. 69, 12 N. L. R. B., No. 7 (decided April 3, 1939); *In the Matter of Shell Oil Co.*, 7 N. L. R. B. 417, 8 N. L. R. B. 920, 9 N. L. R. B. 908, 10 N. L. R. B., No. 119 (decided January 21, 1939); *In the Matter of Tidewater Associated Oil*, 5 N. L. R. B. 982, 8 N. L. R. B. 829, 9 N. L. R. B., 821; *In the Matter of Unit Cast Corp.*, 7 N. L. R. B. 129, 8 N. L. R. B. 831, 833; *In the Matter of J. J. Little & Ives Co.*, 6 N. L. R. B. 411, 7 N. L. R. B. 12; *In the Matter of Fedders Mfg. Co.*, 3 N. L. R. B. 818, 4 N. L. R. B. 770, 5 N. L. R. B. 269, 7 N L. R. B. 817; *In the Matter of Zellerbach Paper Co.*, 4 N. L. R. B. 348, 5 N. L. R. B. 308; *In the Matter of Elliott Bay Lumber Co.*, 8 N. L. R. B. 753, 9 N. L. R. B. 3, 6; *In the Matter of Shell Petroleum Corp.*, 9 N. L. R. B. 831, 10 N. L. R. B., No. 101, 11 N. L. R. B., No. 47 (decided February 21, 1939); *In the Matter of Utah Copper Co.*, 7 N. L. R. B. 928, 8 N. L. R. B. 968; 9 N. L. R. B. 775; *In the Matter of Oceanic Stevedoring Co.*, 8 N. L. R. B. 1325, 9 N. L. R. B. 72, 74, 10 N. L. R. B., No. 52 (decided December 15, 1938); *In the Matter of Bemis Bros. Bag Co.*, 10 N. L. R. B., No. 24, 24a, 11 N. L. R. B., No. 96 (decided March 10, 1939); *In the Matter of Kingan & Co.*, 13 N. L. R. B., No. 86 (decided July 20, 1939).

lake Iron Corporation, 4 N. L. R. B. 55, 61, as follows:

> The Act, however, does not require an unwilling majority of employees to bargain through representatives. It merely guarantees and protects that right of a majority if it chooses to exercise it. Yet if the opportunity of voting against the organizations named on the ballot were denied, a majority might be forced against its will to accept representation by one or other of the nominees. The policy adopted by the Board is designed merely to make sure that the votes recorded for a particular representative express a free choice rather than a choice in default of the possibility of expressing disapproval of both or all proposed representatives.

In accordance with these principles, a majority of the employees in the instant case, including both proponents of I. B. E. W. and persons opposing representation by either organization, have the opportunity to vote that they do not desire representation by U. W. O. C. If they do so vote, the U. W. O. C. will not be certified. If the I. B. E. W. were then of the opinion that a majority of the employees might vote for it, the regular procedure of the statute is still available to it in a later representation case This procedure is entirely fair, is consistent with the policy of the Act, and clearly is not unreasonable or arbitrary.

The decision of the court below requires the Board to place the two contesting organizations on the run-off ballot and prevents any expression of opinion by employees opposed to both. The latter would be compelled to vote for one or the other organization, or else not vote at all. In its administrative judgment and discretion the Board was entitled to consider such a procedure inadvisable in that it forced a vote, if one were to vote at all, for representatives who may not be desired.

In view of the above considerations, we submit that the procedure adopted by the Board conforms to the policy of the statute, and that the court was entirely without warrant in substituting for the Board's reasonable exercise of discretion its own judgment as to the manner in which the run-off election should be held. It may be that some form of ballot other than that used by the Board in the conduct of run-off elections in this and other cases may not be inconsistent with the policies of the Act. It may be also that the Board, in the light of further experience, may decide to adopt a different form of ballot, or, indeed, may conclude that run-off elections should not be held at all. The point is, however, that the Board's judgment and experience thus far have persuaded it that run-off elections and the form of ballot used in the present case properly aid in carrying out the policies of the statute, and that this determination is based upon reasonable grounds. The court below was not war-

ranted in setting aside the Board's Supplemental Decision and Direction of Election as arbitrary merely because it disagreed with the Board as to which form of ballot is best.

CONCLUSION

The questions presented by this case are of general importance. The decision on the jurisdictional question is not only important *per se*, but also conflicts with decisions in other courts of appeals and is contrary to the terms of the Act. The decision on the merits is also erroneous. For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

GOLDEN W. BELL,
Acting Solicitor General.

CHARLES FAHY,
General Counsel,
National Labor Relations Board.

JULY 1939.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C. Supp. IV, Title 29, Sec. 151 *et seq.*) are as follows:

> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in

this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation

of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain [1] such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c), is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

[1] So in original.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person

an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the

pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its

original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying,

and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101–115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

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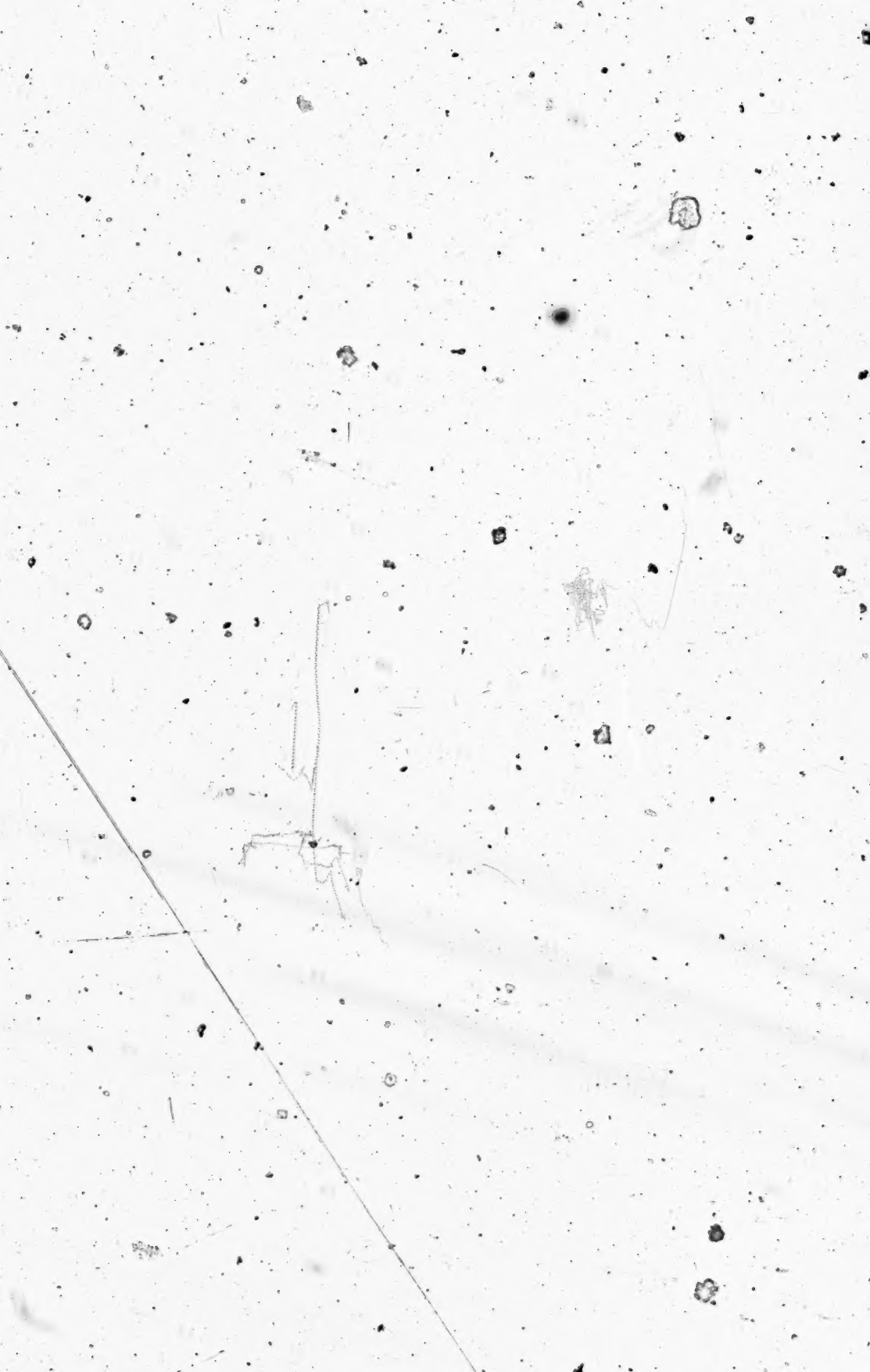

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OCT 31 1939
CHARLES ELMORE CROPLEY
CLERK

No. 253

In the Supreme Court of the United States

OCTOBER TERM, 1939

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 253

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINION BELOW

The opinion of the circuit court of appeals (R. 44–48) is reported in 105 F. 2d 598. The "Decision and Direction of Election" (R. 28–36) issued by the Board on November 8, 1938, is reported in 9 N. L. R. B. 742, and the "Supplemental Decision and Second Direction of Election" (R. 14–18), issued by the Board on March 1, 1939, is reported in 11 N. L. R. B. 848.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 28, 1939 (R. 43). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether a direction of election issued by the National Labor Relations Board in a proceeding under Section 9 (c) of the National Labor Relations Act is reviewable by a circuit court of appeals under Section 10 (f) of the Act.

2. In an election in which the names of two competing labor organizations were placed on the ballot and a place was also provided for the employees to vote against representation by either organization, neither of the competing organizations obtained a majority of the votes cast, although one received a plurality. The Board directed a run-off election in which the name of the organization which received a plurality in the first election is to be placed on the ballot and that of the organization which received the smaller number of votes in the first election is to be omitted. If the answer to the first question is in the affirmative, there is presented the question whether this direction of election was an abuse of discretion.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (c. 372, 49 Stat. 449, 29 U. S. C. Supp.

IV, Section 151 *et seq.*), are set forth in the Appendix, *infra,* pp. 49–56.

STATEMENT

On February 2, 1938, the International Brotherhood of Electrical Workers, Local 876 (I. B. E. W.), one of the respondents here, filed with the Regional Director of the Board at Detroit, Michigan, a petition alleging that a question affecting commerce had arisen concerning the representation of employees of Consumers Power Company, Jackson, Michigan (hereinafter called the Company), and requesting an investigation and certification of representatives for collective bargaining pursuant to Section 9 (c) of the Act (R. 28).

Pursuant to its Rules and Regulations (Art. III, Sec. 3, Series 1, as amended), the Board, on August 12, 1938, authorized the Regional Director to conduct an investigation and to provide for an appropriate hearing upon notice (R. 28). Pursuant to notice, a hearing was held on August 29 and 30 at Detroit, Michigan, before a Trial Examiner (R. 29). The I. B. E. W., the Utility Workers Organizing Committee (U. W. O. C.), which also claimed to represent employees of the Company, and the Company were all represented by counsel and participated in the hearing (R. 29). On November 8, 1938, after opportunity for oral argument before the Board (R. 29), of which the parties did not avail themselves, the Board issued a

Decision and Direction of Election (R. 28–36). The Board found that a question affecting commerce had arisen concerning the representation of the Company's employees, and pursuant to the authorization contained in Section 9 (c) of the Act so to do, directed that as part of the investigation an election by secret ballot should be conducted under the direction and supervision of the Regional Director to determine whether the Company's employees, with certain exceptions not here relevant, desired to be represented by the I. B. E. W., by the U. W. O. C., or by neither (R. 36).

Thereafter, from January 10 to January 13, 1939, the Regional Director conducted such election by secret ballot, as required by the Board's Direction of Election and amendments (R. 37–41) thereto. On January 21, 1939, pursuant to the Board's Rules and Regulations (Art. III, Sec. 9, Series 1, as amended), the Regional Director served on the parties his Intermediate Report on the conduct of the ballot. No exceptions to the Intermediate Report were filed (R. 15). The Report showed the results of the secret ballot to be as follows (R. 3, 15):

Total Number of Employees Eligible	2,977
Total Number of Ballots Cast	2,806
Total Number of Votes for I. B. E. W.	1,072
Total Number of Votes for U. W. O. C.	1,164
Total Number of Votes for Neither	506
Total Number of Challenged Ballots	52
Total Number of Blank Ballots	1
Total Number of Void Ballots	11

Upon the expiration of the period for filing exceptions to the Intermediate Report, the Regional Director forwarded it to the Board. Thereafter, by letter, the chairman of the U. W. O. C. requested that the Board certify the U. W. O. C. as representative of the employees (R. 16). The Secretary of the Board replied that such certification would not be in accordance with the principle established by the Board that no representative be certified which has not received a majority of the votes cast in an election (R. 16). Counsel for the U. W. O. C. and the chairman thereof thereupon requested the Board to direct the holding of a run-off election providing for a choice for or against the U. W. O. C., which had received a plurality of the votes in the January election (R. 16). The Secretary of the Board, on February 8, 1939, notified the parties that the Board would direct the holding of a run-off election unless objection was received within five days (R. 16, 4).

On February 11, 1939, counsel for the I. B. E. W. informed the Board that it had no objection to the holding of a run-off election in which the I. B. E. W. would be included on the ballot, but that it did object to the holding of any run-off election in which that organization's name would not be included, and requested oral argument before the Board concerning its right to appear on the ballot (R. 16, 12–14). The latter request was granted and oral argument was had before the

Board on February 24, 1939, by counsel for the I. B. E. W. and counsel for the U. W. O. C. (R. 16, 6).

On March 1, 1939, the Board issued its Supplemental Decision and Second Direction of Election, now sought to be reviewed (R. 14–18). In this decision the Board stated (R. 16–17):

> In *Matter of Interlake Iron Corporation* and *Amalgamated Association of Iron, Steel, and Tin Workers of North America, Local No. 1657*, 4 N. L. R. B. 55, the Board, in reaffirming its policy of providing a space on the ballot, in elections involving two or more rival unions, in which a voter may indicate that he does not desire either of the named unions to represent him, stated that, "In the event that the election in the present case results in none of the three preferences obtaining a majority of the votes cast, we will, upon request of the labor organization receiving the greater number of votes, promptly direct a run-off election, in which the ballot will allow employees the opportunity to vote for or against this organization." This policy has since its formulation been consistently followed by the Board. We have considered the questions raised in the I. B. E. W. letter of February 11, 1939, and the considerations advanced by counsel for I. B. E. W. at the oral argument, and find no reason to depart from our established practice in cases of this kind.
>
> A majority of the employees of the Company in the appropriate unit have indicated

> a desire to bargain collectively with the Company, although they have accorded neither of the rival unions a majority. As noted above, U. W. O. C., which received the greater number of votes validly cast in the election, has requested the holding of a run-off election. The Board finds that the question concerning representation which has arisen can best be resolved by the holding of a run-off election in which the employees in the appropriate unit will be given the opportunity to decide whether or not they desire to be represented by U. W. O. C. We will so direct. * * *

The Board accordingly directed that a run-off election by secret ballot should be conducted within forty-five days, under the supervision of the Regional Director, to determine whether or not the employees desired to be represented by the U. W. O. C. (R. 17–18). On March 15, 1939, the Board directed that the run-off election be conducted on April 11, 12, 13, and 14, 1939 (R. 19, 21).

On April 5, 1939, the I. B. E. W. filed its petition in the court below to review and set aside the Board's Supplemental Decision and Second Direction of Election (R. 1–12). It also applied for a stay pending a determination of its petition for review (R. 21–23). On April 10, 1939, the Board filed its opposition to the application for a stay (R. 23–24) and a motion to dismiss the petition for review for lack of jurisdiction (R. 24–27). After oral argument, the court, on April 10, 1939,

granted the I. B. E. W.'s application for a stay of the election pending the hearing and determination of its petition for review (R. 42). On May 10, 1939, the case was heard by the court on the Board's motion to dismiss, but the merits of the case were also briefed and argued (R. 43, 48). On June 28, 1939, the court handed down its decision, in which it held that it had jurisdiction to review the Board's Supplemental Decision and Second Direction of Election and, on review thereof, held that the Board had acted unlawfully in excluding the I. B. E. W. from the run-off ballot (R. 44–48). The court ordered that the "order complained of be * * * set aside" (R. 48, 43). On October 9, 1939, this court granted a writ of certiorari.

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that it had jurisdiction to review the Board's proceedings in this case.

2. In holding that the Board had acted unlawfully in directing that the name of respondent local be omitted from the ballot in the run-off election.

3. In setting aside the Board's Second Direction of Election.

SUMMARY OF ARGUMENT

I

The court below had no jurisdiction to review the Board's proceedings in this case. The author-

ity of the circuit courts of appeals to review orders of the Board is derived solely from Sections 9 (d) and 10 (e) and (f) of the Act. The court below held that it had jurisdiction under Section 10 (f), but this holding is contrary to the decisions of numerous other courts and to the plain meaning of the Act. Examination of the provisions of Sections 9 and 10 shows that Section 9 (d) was intended to preclude the courts from reviewing representation investigations under Section 9 except in connection with their review of orders issued by the Board in unfair labor practice cases under Section 10 where such orders are based upon facts certified by the Board in representation investigations under Section 9, and that Section 10 (f) provides for review only of final orders made in unfair labor practice cases under Section 10.

1. That Section 10 (f) applies only to the review of orders entered in unfair labor practice cases under Section 10 appears clearly from its position as an integral part of Section 10 and from various of its express terms. These plainly show that Section 10 (f) was not intended to provide review of a case like the present, which presents no unfair labor practice, no pleadings, and no order.

2. Moreover, Section 10 (f) unequivocally requires that there be a "final order" as a prerequisite to judicial review. The Board's direction of election is not a final order. *Cupples Company Manufacturers* v. *National Labor Relations Board,*

103 F. 2d 953, 955 (C. C. A. 8th). Cf. *United Employees Association* v. *National Labor Relations Board*, 96 F. 2d 875 (C. C. A. 3d); *American Federation of Labor* v. *National Labor Relations Board*, 103 F. 2d 933 (App. D. C.), No. 70, this Term, pending argument herewith. We think that it is not an order at all. But even if it is regarded as an order, it is plainly interlocutory. Thus the holding of the court below that it had jurisdiction is contrary not only to the terms of Section 10 (f), but also to the "traditional conceptions of federal judicial power." *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 130; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 383–385.

3. Section 9 (d) of the Act was affirmatively intended by Congress to preclude a review of a direction of election, or any other action by the Board in a representation investigation under Section 9, except in the single situation where an order of the Board in an unfair labor practice case under Section 10 is based upon facts certified in a representation proceeding and enforcement or review of the order is sought pursuant to Section 10 (e) or (f). This interpretation of Section 9 (d) is shown to be correct by the legislative history. S. Rept. No. 573, 74th Cong., 1st Sess., p. 15; H. Rept. No. 1147, 74th Cong., 1st Sess., p. 23; 79 Cong. Rec. 7658. The reports of the committees recommending the passage of the National Labor Relations Act show that

Congress was especially anxious to prevent delays in election proceedings such as had been occasioned by resort to the courts permitted under Public Resolution 44 (approved June 19, 1934, c. 677, 48 Stat. 1183), which, with Section 7 (a) of the National Industrial Recovery Act (Act of June 16, 1933, c. 90, 48 Stat. 195, 15 U. S. C., Sec. 701, *et seq.*), was the legislative predecessor of the National Labor Relations Act. H. Rept. 1147, 74th Cong., 1st Sess., pp. 6–7; S. Rept. 573, 74th Cong., 1st Sess., pp. 5–6.

4. The foregoing interpretations of Sections 10 (f) and 9 (d) raise no substantial question of constitutionality. There can be no question as to the validity of Section 10 (f), since Congress clearly was not required to invest the circuit courts of appeals with jurisdiction. *Shannahan v. United States*, 303 U. S. 596; *In re National Labor Relations Board*, 304 U. S. 486, 495. In regard to Section 9 (d), construed to be exclusive, any claim of unconstitutionality under the due process clause is answered by the fact that the Act grants no right to an election and that the Board's direction of election has no legal effect upon any right of self-organization or collective bargaining. Even if rights of respondents were assumed to be affected by the Board's direction of election, there would be no constitutional necessity for a review of it, since it is merely an interlocutory step in proceedings not yet completed before the Board. *Rochester Tel. Corp.* v.

United States, 307 U. S. 125; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. Moreover, generally speaking, the Constitution does not require that even the final action of an administrative body be reviewable. See cases collected in the concurring opinion in *St. Joseph Stockyards Co.* v. *United States*, 298 U. S. 38, 77–81, and in *Rochester Tel. Corp.* v. *United States*, *supra*.

II

Even assuming that the court below had jurisdiction, it erred in setting aside the Board's direction of the run-off election. The Board did not abuse its discretion under Section 9 (c) in directing that the ballots to be used should omit the name I. B. E. W. and should permit only votes for or against the U. W. O. C. The Board's direction was in accordance with its well-settled practice and was designed to afford the employees full opportunity freely to make known their desires.

The decision of the court below that the form of ballot utilized by the Board is illegal and unfair was based upon the misapprehension that the purpose of an election is "to select, not to reject, representatives" (R. 46; 165 F. 2d, at 600). The purpose of an election, pursuant to Section 9 (c), is to enable the Board to ascertain whether there is a collective-bargaining representative of a majority of the employees. The form of ballot advo-

cated by the respondents and apparently required by the court below—i. e., a ballot containing the names of both unions, and with no place for a "neither" vote—would inevitably result (barring a tie vote) in one or the other of the two organizations on the ballot winning the election and, presumably, being certified. But since the employees not desiring to be represented by either union would have no opportunity to so indicate in an election so conducted, the results of the election would not necessarily prove that the winning union was in fact the freely chosen representative of a majority of the employees.

The form of ballot utilized by the Board precludes any possibility of a certification of a union which in fact is not the freely chosen representative of a majority of the employees; any employee who does not wish to be represented by the union on the ballot may vote against it. At the same time the employees who voted for the union which did not receive a plurality of the votes in the first election are enabled to subordinate, if they so wish, their choice as between particular representatives to their desire for collective bargaining. Experience in other cases shows that this form of the ballot does not predetermine the result in favor of the union named on it, and appears fully to justify the Board's adherence in this case to its consistent practice.

ARGUMENT

I

THE COURT BELOW HAD NO JURISDICTION TO REVIEW THE DIRECTION OF ELECTION

The authority of the circuit courts of appeals to review orders of the Board rests wholly on Sections 9 (d) and 10 (e) and (f) of the Act. The court below held that it had jurisdiction to review the direction of election in this case under Section 10 (f). This decision is contrary to the prior holding of the same court in *Combustion Engineering Co.* v. *National Labor Relations Board*, 95 F. 2d 996, and to numerous decisions of other courts passing on the question. *Unlicensed Employees of Sabine Transportation Co.* v. *National Labor Relations Board*, decided November 12, 1937 (C. C. A. 5th) (reported in C. C. H., Labor Law Service, p. 16040); *Cupples Company Manufacturers* v. *National Labor Relations Board*, 103 F. 2d 953, 955 (C. C. A. 8th); *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board*, 97 F. 2d 1010 (C. C. A. 7th). See also *American Federation of Labor* v. *National Labor Relations Board*, 103 F. 2d 933 (App. D. C.), certiorari granted, October 9, 1939, No. 70, this Term; *Unite Employees Ass'n* v. *National Labor Relations Board*, 96 F. 2d 875 (C. C. A. 3d); *Wallach's, Inc.* v. *Boland*, 277

[1] In the *Combustion Engineering* and *Unlicensed Employees* cases the Board's motions to dismiss petitions for review of directions of elections for lack of jurisdiction were

N. Y. 345 (decided under the New York State Labor Relations Act).

A summary of the relevant provisions of Sections 9 and 10 will facilitate comprehension of the question. Section 9 deals with and is headed "REPRESENTATIVES AND ELECTIONS." Subsection (a) declares that representatives designated for collective bargaining designated by a majority of the employees in an appropriate unit shall be the exclusive representatives for collective bargaining of all the employees in the unit. Subsection (b) authorizes the Board to determine the appropriate unit. Subsection (c) provides that, when a question affecting commerce arises concerning the rep-

granted without opinion. The same result was reached by consent in the *New York Handkerchief* case, but the court's additional statement that the petition was dismissed "for the reason that said petition is premature" indicates that the court believed it was without jurisdiction.

In the *Cupples* case, which involved both a direction of election and an order against the employer in an unfair labor proceeding under Section 10, the court held that the scope of its inquiry must be limited to the latter. The decision in the *Cupples* case is in direct conflict on this point with *National Labor Relations Board* v. *Falk Corporation* (C. C. A. 7th), 106 F. 2d 454, now pending on petition for certiorari, No. 460, this Term.

In the *American Federation of Labor* and *United Employees* cases the courts held that they had no jurisdiction to review certifications issued by the Board. If a certification—the final step in a representation proceeding—is not reviewable, a direction of election, which is a preliminary direction of the Board to its own subordinate officials to take certain proceedings as part of the investigation concerning representation, is, *a fortiori*, not reviewable.

resentation of employees, the Board may investigate and certify the name of the representative designated, and may take a secret ballot of employees or utilize any other suitable method to ascertain the representative. Subsection (d) provides that when an order of the Board in an unfair practice case under Section 10 is based upon facts certified in a representation investigation under Section 9, and review of the Section 10 order is sought, the decree of the court enforcing, modifying, or setting aside the order shall be entered upon a transcript including the certification and the record of the representation investigation under Section 9. Section 9 thus deals with "Representatives and Elections" and provides for a review only where such proceedings are involved in a Section 10 case.

Section 10, on the other hand, deals solely with and is headed "PREVENTION OF UNFAIR LABOR PRACTICES." The provisions of this section form a coherent and distinct whole. Subsection (a) empowers the Board "as hereinafter provided, to prevent any person from engaging in any unfair labor practice [listed in section 8] affecting commerce." Subsection (b) provides that when any person is charged with engaging in any such unfair labor practice the Board may issue "a complaint stating the charges" and may hold a hearing, and that the person named in the complaint has the right to file an "answer." Subsection (c) directs the Board, if upon the testimony it is of the opinion that there

has been any unfair labor practice, to state its findings of fact, and to issue an "order" to cease and desist and to take appropriate affirmative action; if it is of the opinion that there has been no unfair labor practice, it is directed to issue an "order" dismissing the complaint. Nowhere else in the statute is the Board empowered to issue an "order"; the "order" referred to in Section 9 (d) is issued pursuant to Section 10 (c). Subsection (d) reserves to the Board authority to modify or set aside any finding or order until a transcript of the record shall have been filed in a court "as hereinafter provided."

Subsection (e) permits the Board to petition the circuit court of appeals in any circuit "wherein the unfair labor practice in question occurred or wherein such person resides or transacts business" for the enforcement of *"such order,"* the court to obtain jurisdiction upon the filing of a transcript of the complete record, "including *the pleadings* and testimony upon which *such order* was entered" and the *"order"* of the Board. The court is granted power to enter a decree enforcing, modifying, or setting aside *"the order"* of the Board. [Italics supplied.]

We come now to subsection (f), which provides:

> Any person aggrieved by a *final order* of the Board granting or denying in whole or in part the relief sought may obtain a review of *such order* in any circuit court of appeals of the United States in the circuit wherein

> the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the *order* of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the *pleading* and testimony upon which the *order* complained of was entered and the findings, and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the *order* of the Board; * * * [Italics supplied.]

The Government submits that the direction of election made under Section 9 in this case was not within the reviewing jurisdiction conferred upon the circuit courts of appeals by the Act. First, Section 10 (f), relied upon by the court below and by the respondent, contemplates review only of orders made under Section 10 in an unfair labor

practice proceeding, and here there was only a representation investigation under Section 9. Second, Section 10 (f) provides only for review of a "final order," and there was no final order here. Third, review of representation investigations is specifically covered by Section 9 (d), which provides that they shall be considered by the courts only in connection with review of orders issued by the Board under Section 10 in unfair labor practice cases where such orders are based, in whole or in part, upon facts certified by the Board in representation investigations. Fourth, the Government's interpretation of the Act raises no constitutional question.

1. The summary of Section 10 made above shows that Section 10 (f) extends only to the review of orders entered in proceedings brought to prevent unfair labor practices, and not to the review of investigation proceedings (except that review of an unfair labor practice order extends to the record in a representation investigation in the single situation specified in Section 9 (d)). Section 10 as a whole was designed to establish a procedure in accordance with which the Board might enter orders prohibiting unfair labor practices and pursuant to which the circuit courts of appeals, on petition of either the Board or an aggrieved party, might review such orders. It plainly was not intended to provide review of a case like the present, which involves no unfair labor practice, no plead-

ings, and no order. That appears from its title, from the language of each of the paragraphs preceding paragraph (f), from the position of paragraph (f) as an integral part of Section 10, and from its express terms, including the reference in it (as in paragraph (e)) to the circuit "wherein the unfair labor practice in question was alleged to have been engaged in."

Moreover, the jurisdiction of the circuit courts of appeals under Section 10 (f) is of the same scope as their jurisdiction under Section 10 (e). *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 369. Section 10 (f) grants no right of review of an order which the Board has no right to enforce under Section 10 (e). And the court below obviously could not have entertained a petition for the enforcement of the Board's direction of election, even assuming *arguendo* that it was a final order. The direction did not purport to require respondent, or anyone other than the Board's Regional Director, to take or refrain from taking any action.

2. Section 10 unequivocally requires that there be, as a prerequisite to review, a "final order." The Board's direction of election is not a "final order." *Cupples Company Manufacturers* v. *National Labor Relations Board*, 103 F. 2d 953, 955 (C. C. A. 8th). Compare *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board*, 97 F. 2d 1010 (C. C. A. 7th); *Ames Baldwin Wyoming Co.* v. *National Labor Relations Board*, 73 F. 2d 489, 490, 491 (C. C. A. 4th). It is not an order at

all, either in form or substance, but is a direction that, as part of the investigation concerning representation authorized by the Board, an election by secret ballot be conducted under the supervision of the Board's Regional Director.[2] Compare *Shannahan* v. *United States*, 303 U. S. 596; *United States* v. *Los Angeles R. R.*, 273 U. S. 299, 310. The direction does not purport to require respondent, or anyone other than the Board's Regional Director, to take or refrain from taking any action. By its use of terminology in the carefully drafted statute, particularly in Section 9 (d) where, alone in the statute the two types of proceedings are de-

[2] The Board's Second Direction of Election, insofar as pertinent, reads as follows (R. 24–25):

"By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 8, of National Labor Relations Board Rules and Regulations—Series 1, as amended, it is hereby

"Directed that, as part of the investigation authorized by the Board to determine representatives for the purposes of collective bargaining with Consumers Power Company, Jackson, Michigan, an election by secret ballot shall be conducted within forty-five (45) days from the date of this Direction, under the direction and supervision of the Regional Director for the Seventh Region, acting in this matter as agent of the National Labor Relations Board, and subject to Article III, Section 9, of said Rules and Regulations, among all the employees of the Company, * * * who were on the pay roll of the Company for the pay-roll period next preceding August 29, 1938, except those who have since quit or been discharged for cause, to determine whether or not they desire to be represented by Utility Workers Organizing Committee, for the purposes of collective bargaining."

scribed in the same section, Congress drew a clear distinction between "facts certified" and "certification" under Section 9, and an "order" issued and reviewable under Section 10.

If the Board's direction of election is regarded as an order within the meaning of the statute, which we think it is not, it is plainly interlocutory and not final, since no legal consequences stem from it. Not until after the election has been held can the Board determine or certify the name of the representative designated by a majority of the employees. Indeed, none may be certified at all. And even when, upon the basis of an election, the Board certifies a labor organization as the exclusive representative of the employees for the purpose of collective bargaining, the certification falls short of being a final order within the scope of Section 10 (f). *United Employees Association* v. *National Labor Relations Board*, 96 F. 2d 875 (C. C. A. 3d); *American Federation of Labor* v. *National Labor Relations Board*, 103 F. 2d 933 (App. D. C.), No. 70, this Term, pending argument herewith.[8] Cf. *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 562; *Shannahan* v. *United States*, 303 U. S. 596; *Wallach's, Inc.* v. *Boland*, 277 N. Y. 345.

Even if, contrary to the decisions last cited, the circuit courts of appeals have jurisdiction to review

[8] This question will be discussed at greater length in our brief in the *American Federation of Labor* case.

a Board certification, although not the basis of any order against the employer in an unfair labor practice case which is under review, yet the instant suit must be dismissed as premature: whether there will ever be a certification in this case is still wholly speculative. The directed election is but a part of the continuing and as yet incomplete investigation, or gathering of evidence, on the question concerning representation. A secret ballot is but a method of ascertaining facts, as is a hearing. After the last election has been held the Board may certify the chosen representative, or, if none is chosen, dismiss the petition for investigation. Meanwhile, the Board's direction of election neither forbids nor compels any action on the part of respondents. In these circumstances, the holding of the court below that it had jurisdiction violates not only the intent of Congress expressed in Section 10 (f) but also the "traditional conceptions of federal judicial power." *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 130. Cf. *In re National Labor Relations Board*, 304 U. S. 486, 494, 495; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 383–385; *Jones* v. *Securities & Exchange Commission*, 79 F. 2d 617, 619 (C. C. A. 2d), certiorari denied, 297 U. S. 705; *Chamber of Commerce* v. *Federal Trade Commission*, 280 Fed. 45, 48 (C. C. A. 8th).

3. It has been shown that Section 10 (b) applies only to the review of final orders entered in unfair

labor practice cases. We now show that Section 9 (d) was affirmatively intended by Congress to preclude a review of a direction of election, or indeed of any action in a representation investigation, except in the single instance there provided. Section 9 (d) provides:

> Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Section 9 (d) thus establishes a method whereby review of Board certifications may be had when an order made pursuant to Section 10 (c)—i. e., in a proceeding to prevent unfair labor practices—is based upon facts certified.[4] In thus making representation investigations reviewable in a single situation, and providing for such review in no other situation, Congress, as conclusively shown by the

[4] Such a case most frequently arises when an order to bargain collectively, pursuant to Section 8 (5), is based in part upon facts found in an investigation under Section 9 (c).

legislative history of the Act, intended that there should be no other such review.

The Senate Committee Report (S. Rept. No. 573, 74th Cong., 1st Sess., p. 14) declares, under the heading "ELECTIONS":

> Section 9 (c) empowers the National Labor Relations Board, whenever a question affecting commerce arises concerning the representation of employees, to conduct an investigation either by secret ballot or otherwise to determine such representatives. In any such investigation an appropriate hearing must be held.
>
> *Section 9 (d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election. An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees. There is no more reason for court review prior to an election than for court review prior to a hearing.* But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by any aggrieved party in the Federal courts in the manner provided in section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides

> a complete guarantee against arbitrary action by the Board. [Italics supplied.]

The House Committee Report (H. Rept. No. 1147, 74th Cong., 1st Sess., p. 23) similarly states:

> As previously stated in this report, the efficacy of Public Resolution 44 [a predecessor of the National Labor Relations Act—see *infra*, p. 27] has been substantially impaired by the provision for court review of election orders prior to the holding of the election. Section 9 (d) of the bill makes clear that there is to be no court review prior to the holding of the election, and provides an exclusive, complete, and adequate remedy whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an election or other investigation pursuant to section 9 (c). The hearing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard.

The affirmative intent of Congress to preclude judicial review of a direction of election, in the absence of any order against the employer based thereon, further appears from the remarks of Senator Walsh, Chairman of the Senate Committee, in response to questions on the floor of the Senate (79 Cong. Rec. 7658), as follows:

> Mr. COUZENS. The Senator said that Resolution 44 was ineffective. Will he tell us

before he concludes why Resolution 44 was ineffective?

Mr. WALSH. It was ineffective, as I think I stated, because of appeals to the courts. In cases where attempts have been made to hold elections the claim has been made that the Board had no legal authority; the cases have been brought into court, and they are in the courts and undecided.

* * * * *

Mr. COUZENS. Would the passage of the pending bill *remove* the appeals to the courts?

Mr. WALSH. *Yes; it would because it limits appeals. It provides for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of the election.* [Italics supplied.]

The references to Public Resolution 44 (approved June 19, 1934, c. 677, 48 Stat. 1183), which, with Section 7 (a) of the National Industrial Recovery Act (Act of June 16, 1933, c. 90, 48 Stat. 195; 15 U. S. C., Sec. 707), was the immediate legislative predecessor of the National Labor Relations Act, indicate the reasons for the anxiety of Congress to limit the review of representation investigations to cases in which they were the bases for unfair labor practice orders. Under Section 2 of that Resolution, the old National Labor Relations Board was empowered to hold elections, but "any order" issued under that authority was re-

viewable in the circuit courts of appeals.[5] Cf. *Ames Baldwin Wyoming Co.* v. *National Labor Relations Board*, 73 F. 2d 489, 490 (C. C. A. 4th).[6] The manner in which this review operated in the single year of its life to nullify the election provisions is described at length in the reports of the committees recommending the passage of the National Labor Relations Act. The following passages from those reports, as well as those already quoted, permit of no doubt as to the design of Congress to remedy the weakness contained in the

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[5] Section 2 read as follows:

"Any board so established is hereby empowered, when it shall appear in the public interest, to order and conduct an election by a secret ballot of any of the employees of any employer, to determine by what person or persons or organization they desire to be represented in order to insure the right of employees to organize and to select their representatives for the purpose of collective bargaining as defined in section 7a of said Act and now incorporated herein.

"For the purposes of such election such a board shall have the authority to order the production of such pertinent documents or the appearance of such witnesses to give testimony under oath, as it may deem necessary to carry out the provisions of this resolution. Any order issued by such a board under the authority of this section may, upon application of such board or upon petition of the person or persons to whom such order is directed, be enforced or reviewed, as the case may be, in the same manner, so far as applicable, as is provided in the case of an order of the Federal Trade Commission under the Federal Trade Commission Act."

[6] In this case, the court held that the direction of election involved therein was not a reviewable order. Inasmuch as the direction did not specify the time or place or terms of the election, the court regarded it as a mere announcement of an election some time in the future.

Act's predecessor. The House Committee Report (H. Rept. 1147, 74th Cong., 1st Sess., pp. 6–7) states:

> Public Resolution 44 has not proved much more satisfactory even in its provisions which had some virtue over the preexisting law, namely, the provisions for elections. * * * Any order issued by the Board under the authority of this section may be enforced or reviewed, as the case may be, by petition in the appropriate circuit court of appeals, following the procedure of the Federal Trade Commission Act.
>
> The weakness of this procedure is that under the provision for review of election orders employers have a means of holding up the election for months by an application to the circuit court of appeals. [The report here discusses instances of delay of elections by applications for review.] * * *
>
> The election is but a preliminary determination of fact, and there is no reason why employers should have an opportunity for court review prior to the holding of the election. The ability of employers to block elections has been productive of a large measure of industrial strife. When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees for collective bargaining, and the employer refuses to accord such recognition, the union, unless an election can promptly be held to determine the choice of representation, runs

> the risk of impairment of strength by attrition and delay while the case is dragging on through the courts, or else is forced to call a strike to achieve recognition by its own economic power. Such strikes have been called when election orders of the National Labor Relations Board have been held up by court review.

The Senate Committee Report (S. Rept. 573, 74th Cong., 1st Sess., pp. 5–6) states, under the heading "WEAKNESSES IN EXISTING LAW":

> *Obstacles to elections.*—Under Public Resolution 44, any attempt by the Government to conduct an election of representatives may be contested *ab initio* in the courts, although such election is in reality merely a preliminary determination of fact. This means that the Government can be delayed indefinitely before it takes the first step toward industrial peace. After almost a year not a single case, in which a company has chosen to contest an election order of the Board, has reached decision in any circuit court of appeals.
>
> This break-down of the law is breeding the very evil which the law was designed to prevent. During the past year and a half the country has lived under the constant shadow of actual or impending warfare in factory and in mine.

The position adopted by the court below would bring on the very consequences which Congress in the light of past experience deliberately sought

to avoid when it drafted the National Labor Relations Act.[1]

To avoid the result of this clearly manifested Congressional intention, and of the natural meaning of Section 9 (d) itself, respondents pointed out in their brief in opposition to the petition for certiorari (pp. 49–50) that Congress did not anticipate the present division in the ranks of organized labor, but had in mind only the need for precluding "vexatious and procrastinating" appeals by employers.

It is true that appeals by employers had focussed attention on the need for preventing the delays occasioned by resort to the courts, but the harm which Congress sought to avoid would be the same regardless of who might be responsible for the particular appeal. Moreover, it appears that Congress contemplated the possibility of rivalry between labor organizations and meant to preclude appeals by them as well as by employers. The House Committee Report (*supra*, p. 26), stated, at page 22, that questions of representation, under Section 9 (c), would "ordinarily arise as between two or more bona fide organizations competing to represent the employees". The Senate Committee Report (*supra*, p. 25) stated, as a justification for Section 9 (d), that "An election is the mere de-

[1] In the year covered by the Board's most recent annual report, the Board ordered elections in 258 cases. *Third Annual Report of the National Labor Relations Board*, p. 40.

termination of a preliminary fact, and in itself has no substantial effect upon the rights *of either employers or employees.*" (Italics supplied.) In any event, the Court cannot interpret Section 9 (d) differently according to who seeks the review. Whatever may have been the motives of Congress in precluding review of representation cases unless the facts therein became in whole or in part support for an order under Section 10, review was nevertheless precluded. If other considerations in the labor movement now indicate that Congress erred, it is for Congress to reconsider the subject, and if it concludes review should be provided for, to prescribe the manner and terms under which it may be had.

4. Respondents also contended in their brief in opposition (pp. 43–49) that the Act would violate the Fifth Amendment if the interpretations of Sections 10 (f) and 9 (d) urged by the Board were correct. The court below apparently thought this argument of some weight. See R. 47; 105 F. 2d, 588, 600. We submit, however, that it is wholly unsubstantial as to both sections.

In regard to Section 10 (f), there can be no possible question of constitutionality, since Congress plainly was not required to confer jurisdiction upon the circuit courts of appeals. *Shannahan* v. *United States*, 303 U. S. 596. And as was said in *In re National Labor Relations Board*, 304 U. S. 486, 495:

The investiture of a court with jurisdiction to review an order on the merits only upon the filing of a transcript exhibiting the Board's final action is not a denial of due process as suggested by counsel.

We think it scarcely less clear that Congress, by Section 9 (d), could exclude judicial review of the Board's direction of election. Respondents' argument to the contrary has not been so stated as to reveal its precise grounds. But, apparently, it is that the Board's direction of election deprives respondents of their alleged rights to an election and rights to self-organization or collective bargaining, and that the due-process clause requires judicial review of any administrative action which affects rights or privileges valued by the parties. However, neither of these propositions is correct. The Board's direction of election has no legal effect upon any rights of respondents. There is not even a statutory, much less a constitutional, right to an election. The Act merely authorizes the Board to investigate questions concerning the representation of employees, and states that in any such investigation the Board "may take a secret ballot of employees, or utilize any other suitable method" of ascertainment. (Section 9 (c)). This is far from granting a private right. It is merely a grant of investigatory and fact-finding power to the Board, and Congress could have withheld or could at will withdraw the power at any time without violating

any constitutional right of respondents. Cf. *Kline* v. *Burke Construction Company*, 260 U. S. 226, 234; *Lauf* v. *E. G. Shinner & Co.*, 303 U. S. 323, 330.

While the statute grants to employees the right of self-organization and collective bargaining (Section 7), these rights are in no way infringed by a mere direction of election. The Board's direction of an election does not purport to prevent or curtail the exercise of either right. Nor does it impose any duty upon the employer to treat or not to treat with a particular representative. As said in *United States* v. *Los Angeles R. R.*, 273 U. S. 299, at 310, "It is the exercise solely of the function of investigation." Even if the U. W. O. C. were to win the election herein, and thereafter be certified as the representative of the employees, the proceeding would have had no such compulsory effect upon the rights of the respondents as would bring it within the scope of judicial review. *United Employees Ass'n* v. *National Labor Relations Board*, 96 F. 2d 875 (C. C. A. 3d); *American Federation of Labor* v. *National Labor Relations Board*, 103 F. 2d 933 (App. D. C.), No. 70, this Term, pending argument herewith. Cf. *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 562; *Pennsylvania Railroad Co.* v. *Labor Board*, 261 U. S. 72; *Wallach's, Inc.* v. *Boland*, 277 N. Y. 345.

Finally, even if it were assumed that the Board's direction of election had any legal effect upon the rights of respondents, we think it very clear that

the Constitution would not require a review of it, for, as already shown (*supra*, pp. 20–33), the Board's direction is a mere interlocutory step in the proceeding. Thus it is the type of administrative action as to which judicial review is especially supererogatory for the reason that it "does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action." *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 130; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 383–385; *Jones v. Securities & Exchange Commission*, 79 F. 2d 617, 619 (C. C. A. 2d), certiorari denied, 297 U. S. 705; *Chamber of Commerce* v. *Federal Trade Commission*, 280 Fed. 45, 48 (C. C. A. 8th). An election, like a hearing, is merely a method of gaining facts, and there is no more constitutional necessity for a review of a direction of an election in a representation case than for a review of a notice of a hearing in an unfair labor practice case. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. Even in cases, unlike the present, involving some final action of an administrative body, it has long been established that there is not, generally speaking, any constitutional right to judicial review. Numerous cases so holding or tacitly so assuming are collected in the concurring opinion in *St. Joseph Stockyards Company* v. *United States*, 298 U. S. 38, 77–81, and in *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125. See also *Federal Radio Commission* v. *Gen-*

eral Electric Co., 281 U. S. 464, 469; *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 275; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, 700–701; *Ex parte Bakelite Corp'n*, 279 U. S. 438.

II

THE BOARD DID NOT ABUSE ITS DISCRETION IN DIRECTING THAT THE NAME OF THE RESPONDENT LOCAL BE OMITTED FROM THE BALLOT IN THE RUN-OFF ELECTION

Respondents' contention on the merits in that the Board acted in excess of its authority under Section 9 (c) in directing that the run-off election be conducted without the inclusion of respondent's name on the ballots to be used. This contention was upheld by the court below, and the decision of that court setting aside the Board's direction of election apparently requires that, if any second election is held, the names of both competing labor organizations must be on the ballot. While we think that the court below was without jurisdiction to pass on the direction of election (*supra*, pp. 14–35), and therefore should have granted the Board's motion to dismiss, upon which the case was heard (R. 48; 105 F. 2d 598, 601), we submit that if the court had jurisdiction its decision on the merits is erroneous.

The practice of the Board in cases in which in the first election two organizations appeared on the ballot, along with a place for the "neither" vote,

and in which none of the three received a majority of the votes cast, has been to hold a run-off election, if requested by the union receiving a plurality, in which the employees may vote for or against representation by the organization obtaining a plurality. It is this practice which is now challenged. Its validity, we think, is plain, in the light of the reasons for its adoption and of its operation to date.

Section 9 (a) of the Act provides that the representative designated by a majority of the employees in an appropriate unit shall be the exclusive representative of all the employees in the unit for purposes of collective bargaining. Section 8 (5) imposes a duty upon the employer to bargain collectively with such a representative, and, when there is such a representative, it also imposes a "negative duty" not to bargain with any other. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44–45. In the absence of such a representative, however, the statute does not require the employer to bargain collectively. Therefore, if a majority of the employees cannot agree upon a representative, or do not wish to be represented at all, the ballots used should enable them to say so. In such a case the Board would dismiss the petition for certification.

Accordingly, the Board, in its conduct of elections, utilizes ballots which are designed to preclude the possibility of certification of a representative

which, in fact, represents only a minority of the employees. In cases where there is only one union claiming to represent the employees, the ballot always allows the employees to vote either for or against the union. In cases, such as the instant, where there are two labor organizations, each claiming to represent the employees, the Board in the first election places the names of both organizations on the ballot, and, in addition, provides a place for the employees to vote for "neither."[8] If a provision were not made for a "neither" vote, it might result, if there were employees who did not desire to be represented at all, that a representative of only a minority of the employees would be certified as the exclusive representative, since the employees who did not desire to be represented would be compelled to vote, if they voted at all, for one or the other of the unions on the ballot. The election would be decisive, whether or not they voted, inasmuch as the votes of a majority of the employees voting would control the result. *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 560–561; *Nashville, C. & St. L. Ry.* v. *Railway Employees Dep't of A. F. of L.*, 93 F. 2d 340, 343 (C. C. A. 6th), certiorari denied, 303 U. S. 649.

[8] If there are more than two competing unions, the Board places the name of each on the ballot, and, in addition, provides a place for a vote for none. *In the Matter of Aluminum Company of America*, 12 N. L. R. B., No. 34; 13 N. L. R. B., Nos. 11, 11b; 15 N. L. R. B., No. 42.

The Board's care to give all eligible employees, nonunion as well as union, opportunity to express themselves fully, is explained in its decision in *In the Matter of Interlake Iron Corporation*, 4 N. L. R. B. 55, 61, as follows:

> The Act, however, does not require an unwilling majority of employees to bargain through representatives. It merely guarantees and protects that right of a majority if it chooses to exercise it. Yet if the opportunity of voting against the organizations named on the ballot were denied, a majority might be forced against its will to accept representation by one or other of the nominees. The policy adopted by the Board is designed merely to make sure that the votes recorded for a particular representative express a free choice rather than a choice in default of the possibility of expressing disapproval of both or all proposed representatives.

In accordance with the Board's practice since the *Interlake* case, the ballot in the first election in the present case permitted the employees to register a vote for the I. B. E. W. or for the U. W. O. C., or for neither (R. 36). No question has been raised as to the propriety of the form of this ballot. The result of the election was, however, inconclusive. Out of a total of 2,977 employees eligible to vote, 1,164 voted for the U. W. O. C., 1,072 voted for the I. B. E. W., and 506 voted for neither (R. 15). Thus, although a majority of the employees in-

cated their desire to be represented for purposes of collective bargaining, at least if they could be represented by the particular organization of their choice, a majority did not agree upon either the I. B. E. W. or the U. W. O. C. as their representative. In such a situation, as has been stated, the Board's established practice was to hold a run-off election upon the request of the union which received a plurality of the votes in the first election, in which the ballot would provide for a vote for or against that union only. This practice, which had been followed in numerous cases prior to the instant one (footnotes 10 and 11, *infra*, p. 45), was first announced in the *Interlake Iron* case, *supra* (4 N. L. R. B. at 62).

When the U. W. O. C. requested the Board to direct a run-off election to determine whether or not the employees desired to be represented by the U. W. O. C. (R. 16), the Board, upon reconsideration of its prior practice in the light of the oral argument in this case (R. 16–17), issued its decision granting the request (R. 14–18).

In thus adhering to its established practice the Board clearly did not abuse the discretion conferred upon it by Section 9 (c). The Board was presented with the following alternatives: (1) to dismiss the petition without directing any further election; (2) to direct a run-off election in which both the U. W. O. C. and the I. B. E. W. would be on the ballot, but in which "neither" would be omitted from the ballot; (3) to direct a run-off

election in which the employees could vote for or against the U. W. O. C.; (4) to direct a run-off election in which the employees could vote for or against the I. B. E. W.; (5) to direct (3) with the understanding that (4) would be directed in the event that (3) should prove indecisive; (6) to direct some other method of ascertaining by what organization, if any, a majority of the employees desired to be represented. We may eliminate (4) as being clearly inconsistent with the results of the first election.

As regards the remaining alternatives, the Board has deemed (1) to be objectionable in that it would foreclose the possibility that a majority of the employees might willingly agree upon a representative notwithstanding that in the first election a large majority signified a desire for collective bargaining by voting for one or the other of the unions (see R. 15). With respect to (5), we submit that such a procedure, although undoubtedly it would be within the power of the Board to adopt, might well be considered objectionable on the grounds, among others, (a) that two run-off elections would probably be required, since those who preferred the I. B. E. W. in the original election would probably vote against the U. W. O. C. in the first run-off in the hope of assuring thereby the holding of the second run-off; and (b), that if such proved to be the case, the result would be that the employees who voted for the U. W. O. C. in the original election would be the ones invited to change their votes

in order to secure collective bargaining, notwithstanding that they constituted the plurality in the original election.

We turn, then, to (2) and (3). Respondents contend, and the court below seems to have held, that (2) is the course which the Board should have followed. We submit, however, that the Board's action in following (3), in accordance with its settled practice was entirely reasonable and within its discretion.

The view of the court below to the contrary was based upon an erroneous construction of Section 9 (a) of the Act and upon a misconception of the purpose of an investigation proceeding under Section 9 (c). These misapprehensions were concretely embodied in its opinion as follows (R. 46; 105 F. 2d, at 600):

> The purpose of the election was to select, not to reject, representatives.

For reasons already indicated (*supra*, pp. 37–39), we think that this interpretation is incorrect. The purpose of an election pursuant to Section 9 (c) is not to compel the selection of a representative, but to enable the Board to ascertain whether there is one. If a majority of the total employees eligible to vote are in fact not agreed upon a representative, the ballot used by the Board should enable the Board to ascertain whether such is the case, for otherwise, contrary to the intent of Section 9 (a) and (c), a union which represents only a minority of the employees might be certified. The problem

of how to avoid such a result in the case of a run-off election is no different, in substance, than the question whether a place for a "neither" vote should be included on the original ballot, which was decided in the *Interlake* case (*supra*, pp. 38–39).

In considering in greater detail the objections to a run-off election in which both the I. B. E. W. and the U. W. O. C. would again be on the ballot, but in which "neither" would be eliminated, we may reasonably assume that the employees who voted for the unions in the original election would vote again for the most part as they did before. Consequently, in order for the I. B. E. W. on such a ballot to secure a majority vote, the probabilities are that the plurality of 92 votes in favor of the U. W. O. C. in the original election could be overcome only by votes drawn from the 506 employees who voted for "neither" in the original election. But since, unlike the situation in the original election, the latter would be afforded no opportunity to vote against representation by the unions, their votes in such a run-off election could not be regarded as genuinely expressive of a desire to be represented by the union for which they voted, but could only be regarded as votes against the rival union, except in the instances in which some of them might have changed their minds since the original election. Thus, as in the case of an original election in which the ballot would exclude a vote for "neither," the Board could not be sure that a majority of the employees were in fact agreed upon collective bar-

gaining through the union winning the election. This is the first objection to the run-on election advocated by respondents. A second objection is that the nonunion employees would be required, if they voted at all, to vote as between unions, neither of which they wanted. We think that this would be a dilemma far more acute than the "parallel of Hobsons' choice" to which the court likened the Board's ballot; R. 46; 105 F. 2d, at 600.

No such doubt or comparable dilemma could arise from the form of ballot directed by the Board. The nonunion employees, under the practice followed by the Board, are enabled to vote against the U. W. O. C., as may also those employees who wish to adhere to their original votes for the I. B. E. W.; but the Board's ballot leaves it open to the latter to subordinate their preference as between representatives to their already indicated desire for collective bargaining. Thus there is no compulsion upon any employee to choose between bargaining representatives, neither of which he wants, or, if he does not vote at all, to be bound, nevertheless, by the vote of the majority of those voting.

The willingness of some employees to subordinate their preference as between unions to their fundamental desire for collective bargaining is borne out by the experience of the Board in similar

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The reference of the court below to the U. W. O. C. as the "nominee of the Board" was clearly unjustified. R. 46; 105 F. 2d, at 600. As already shown, the U. W. O. C. is to be on the Board's ballot for the reason that it received a plurality of the votes in the original election.

run-off elections hitherto held in other cases. In six of the thirteen such elections which have been held in cases now closed, the union which was on the ballot in the run-off election failed to receive a majority of the votes.[10] In the remaining seven cases the union which was on the ballot won the election.[11] While these results would seem to support the practice of holding a run-off election, they rebut the claim of respondents that the form of ballot directed by the Board in the instant case has predetermined the result of the election in favor of the U. W. O. C.

It may be noted that run-off elections conducted in accordance with the method here chal-

[10] *In the Matter of J. C. Little & Ives Co.*, 7 N. L. R. B. 12; *In the Matter of Shell Oil Co.*, 9 N. L. R. B. 908, 10 N. L. R. B. 1370; *In the Matter of Tidewater Associated Oil*, 9 N. L. R. B. 821; *In the Matter of Utah Copper Co.*, 9 N. L. R. B. 775; *In the Matter of Aluminum Line et al.*, 10 N. L. R. B. 672; *In the Matter of Bemis Bros. Bag Co.*, 11 N. L. R. B. 1058.

[11] *In the Matter of Folders Mfg. Co.*, 5 N. L. R. B. 260; *In the Matter of Whitaker Paper Co.*, 7 N. L. R. B. 305; *In the Matter of Elliott Bay Lumber Co.*, 9 N. L. R. B. —; *In the Matter of Unit Cast Corp.*, 8 N. L. R. B. 831; *In the Matter of Shell Petroleum Corp.*, 11 N. L. R. B. 572; *In the Matter of Milwaukee Publishing Co.*, 12 N. L. R. B., No. 7; *In the Matter of Kingan & Co.*, 14 N. L. R. B., No. 54. A similar result was reached in *In the Matter of Aluminum Co. of America*, 15 N. L. R. B., No. 42, following a series of run-off elections involving three competing labor organizations. (See 12 N. L. R. B., No. 34; 13 N. L. R. B., No. 11; 13 N. L. R. B., No. 11 (b).)

lenged have been requested of the Board by unions affiliated with both of the two major labor organizations of the country. Six of the thirteen run-off elections which have been held were held at the request of unions affiliated with the American Federation of Labor, with which respondents are affiliated.[12] In the seven other cases the requests were made by unions affiliated with the Congress of Industrial Organizations, or its predecessor, the Committee for Industrial Organizations.[13]

In view of the foregoing considerations, we submit that the court below clearly erred in holding that the Board's direction in this case was illegal and unfair. Section 9 (c) obviously gives the Board wide discretion as to the manner in which it may conduct an investigation to ascertain rep-

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[12] *In the Matter of J. J. Little & Ives Co.; In the Matter of Unit Cast Corp.; In the Matter of Tidewater Associated Oil; In the Matter of Shell Oil Co.; In the Matter of Milwaukee Publishing Co.; In the Matter of Kingan & Co., Inc.; supra*, footnotes 10 and 11.

[13] In the *Aluminum* case (*supra*, footnote 11), the first request for a run-off election was filed by an independent association (12 N. L. R. B., No. 34). In the second run-off election the Association received a smaller number of votes than the remaining union on the ballot (13 N. L. R. B., No. 11 (b)), and the Board, accordingly, directed a final run-off election, in which its name would be omitted from the ballot. The Association applied to the court below for a stay of the Board's direction. The application was denied by the court without opinion. *Aluminum Employees Association v. National Labor Relations Board*, decided August 30, 1939 (not reported).

resentatives. Cf. *Pennsylvania Railroad Co.* v. *Labor Board*, 261 U. S. 72, 83, 85; *Nashville, C. & St. L. Ry.* v. *Railway Employees Dept. of A. F. of L.*, 93 F. 2d 340, 342 (C. C. A. 6th), certiorari denied, 303 U. S. 649; *Association of C. E. of A., T. & S. F. Ry. System* v. *Brotherhood of Ry. & S. S. Clerks*, 85 F. 2d 152, 157 (C. C. A. 7th). And when the form of ballot directed by the Board is analyzed in the light of the provisions of Section 9 (a) and (c), and of actual experience, it may not be said that the Board abused its discretion. Perhaps the Board, in the light of further experience, may decide to adopt a different form of ballot ((6), *supra*, p. 41), or, indeed, may conclude that run-off elections should not be held at all. The Board's judgment and experience thus far, however, have persuaded it that run-off elections and the form of ballot used in the present case properly aid in carrying out the policies of the Act. That conclusion is based upon reasonable grounds.

CONCLUSION

It is submitted that the court below was without jurisdiction and that, therefore, this Court should reverse the decision and remand the case with direction to dismiss the petition for review. In the event that the court below is held to have had jurisdiction, the Court should reverse the decision and

sustain the Supplemental Decision and Second Direction of Election issued by the Board.

Respectfully submitted.

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OCTOBER 1939.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. Supp. IV, Sec. 158 *et seq.*) are as follows:

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, main-

tained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain [1] such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c), is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be

[1] So in original.

established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board

shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file

in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive.

and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems

just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101–115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 253.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876, IN OPPOSITION TO PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR A WRIT OF CERTIORARI.

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A. As the Act itself, fully demonstrates that the employees' right of collective bargaining, through representatives of their own choosing, is the Act's principal and predominant purpose and means of effectuating it, and that the prevention of the proscribed unfair labor practices is integrally connected with and essentially ancillary to said principal and predominant purpose, it follows that the broad provisions for judicial review under Section 10 (f) of the Act properly and necessarily include jurisdiction and control by such review of orders of the Board destroying said major right of employees to collective bargaining in violation of said purpose of the Act 20

B. Apart from the reasons discussed hereinbefore, Section 10 (f) of the Act conferred jurisdiction upon the Court below to review the Board's Order, operating so destructively upon Respondents' cardinal rights under the Act. The construction of said Section, contended for by Petitioner, against judicial review, under the Act, of said Order, would unconstitutionally deprive Respondents of their valuable rights, and would make the Act, so applied, violative of the Fifth Amendment 43

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OPINIONS BELOW.

The Opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 52 to 56), filed June 28, 1939, is not yet reported. It may be found in the Labor

Law Service published by Commerce Clearing House, Inc., Court and Board Decisions Supplement, [¶18,390], upon pages 18,394 to 18,396, Report 70, July 7, 1939. The Supplemental Decision and Second Direction of Election of the National Labor Relations Board (R. 21 to 25), entered and issued by the Board on March 1, 1939, are reported as 11 N. L. R. B., No. 63. The Decision and Direction of Election of the National Labor Relations Board entered and issued by the Board on November 8, 1938 (R. 36 to 44), as amended November 23, 1938 (R. 45), are reported in 9 N. L. R. B. 742, and the Second Amendment thereto of December 22, 1938 (R. 46 to 49), is reported as 10 N. L. R. B., No. 65.

QUESTIONS PRESENTED.

In its Petition for Certiorari (pp. 2-3), the National Labor Relations Board, in its statement of the questions presented to this Honorable Court for decision, specifies two questions, each of them in abstract and superficial form, not as the questions involved in this cause were presented to and argued before the Court below by the parties, and not in such form as to express the actual and essential questions presented.

The actual questions presented to and decided by the Court below were:

1. Did the ballot prescribed by the Board's Order of March 1, 1939, for the directed so-called "Election" by the employees of the Consumers Power Company, deny and, in effect, destroy the highly important and vital right of said employees to the *Election, which the Act*, in its main policy and purpose, secures to them, to *select and designate representatives of their own choosing* for collective bargaining?

2. Whether, under and within the provisions of the National Labor Relations Act, the Circuit Courts of Appeals have jurisdiction to review and set aside an Order of the National Labor Relations Board, which finally and irreparably *denies* to *employees*, whose rights the National Labor Relations Act was passed to protect and secure, supremely valuable rights granted to them by the principal provisions of the Act and secured to them by the Fifth Amendment?

3. Are the Respondents (established and nationally recognized Labor Unions of employees) under Section 10 (f) of the National Labor Relations Act, as said Section, like all other provisions of the Act, is to be read and enforced so as to effectuate its predominant policy and purposes, entitled to judicial determination by the Circuit Courts of Appeals of basic and serious questions whether the National Labor Relations Board has *violated* the Act by Orders which, finally and beyond redress, deprive *employees* in large numbers of valuable rights granted to them, and secured against deprivation, by the Act itself, as well as by the Fifth Amendment?

STATUTES INVOLVED.

This cause involves questions arising under the National Labor Relations Act of July 5, 1935 (49 Stat. 449; U. S. C. Sup. II, Title 29, Section 151, *et seq.*). and under the Fifth Amendment to the Constitution.

STATEMENT.

The Statement contained in the Petition for Certiorari is, it is respectfully submitted, incomplete, and therefore the Respondents submit the following statement of the case.

The proceeding in the Court below was by Respondents' Petition to review and set aside the Board's Order, designated Supplemental Decision and Second Direction of Election (R. 21 to 26), entered on March 1, 1939.

The Respondents, as persons aggrieved by the Order, pursuant to Section 10 (f) and Section 9 (d) of the Act, complained of it as illegally and finally depriving them of supremely important rights granted them by the Act for their own benefit and protection and to secure and effectuate the dominant policy of the Act.

The Board filed a Motion (R. 32 to 35) to dismiss the Petition, thus admitting, for the purposes of the proceeding, all allegations of said Petition for Review upon which the relief it prayed was based. On May 10, 1939, the case came on for final hearing before the Court below on the Board's said Motion to Dismiss, and was fully briefed and argued upon the merits by counsel for both sides (R. 51, 56). On June 28, 1939, the Court below entered its Order setting the Board's Order aside (R. 51, 56).

The membership of the Respondent, the Brotherhood Local, consists of a large portion of the employees of the Consumers Power Company, an operating public utility corporation furnishing electric current and power in Michigan. The Brotherhood Local is a constituent of the Respondent, the International Brotherhood, affiliated with the American Federation of Labor. Other employees of the Company belong to a purported labor organization, known as Utility Workers Organizing Committee, affiliated with the CIO.

On February 2, 1938, the Respondent, the Brotherhood Local, petitioned the Regional Director of the Board at Detroit, Michigan, requesting the holding of an election by the employees of the Company for the purpose of selecting a representative of their own choosing for collective bargaining with the Company. After considerable delay on the part of the Board, on December 22, 1938, it entered a Decision and Direction of Election (amendatory of previous Decisions and Directions of Elections issued theretofore in said proceedings on November 8, 1938, and November 23, 1938, respectively), directing the Regional Director, within seventy days from November 8, 1938, to conduct an election by secret ballot among certain specified employees of the Company, to determine whether such employees desired to be represented by the Respondent, the Brotherhood Local, affiliated with the American Federation of Labor, or by Utility Workers Organizing Committee, affiliated with the Congress for Industrial Organization, for the purpose of collective bargaining, or by neither.

The following were the results of that election held January 10-13, 1939:

Total number of employees eligible	2,977
Total number of ballots cast	2,806
Total number of votes for International Brotherhood of Electrical Workers, Local 876	1,072
Total number of votes for Utility Workers Organizing Committee	1,164
Total number of votes for neither	506
Total number of challenged ballots	52
Total number of blank ballots	1
Total number of void ballots	11

Neither union having received a majority of the votes validly cast in the election, there was no representative elected.

On February 2 and February 6, 1939, the CIO Union requested the Board to direct a run-off election to be expressly limited to *only* a choice *for or against the CIO Union*, and on February 8, 1939, the Board notified the Respondents that the Board would direct the holding of such a run-off election unless objection thereto was received within five days thereafter.

On February 11, 1939, the Respondents, through their General Counsel, informed and notified the Board, by letter and petition (see Respondents' Exhibit No. 1, R. 17 to 20), that they had no objection to the run-off election, if the contestants or candidates named upon the ballot used in the election were the two organizations, namely, the CIO Union, and the Respondent, the Brotherhood Local, which, respectively, had received the highest and the next highest number of votes in the election of January 10 to 13, 1939; further, that such condition was apposite and important with respect to the proposed run-off election, because intimations had been made, and rather widely circulated, by the CIO Union, that it only or it and "Neither", would appear upon the ballot, without the name of the Respondent, the Brotherhood Local, appearing at all, whereby the employees would be deprived of voting for said Respondent, and such "election" of a collective bargaining agency to represent the employees of the Company would *not be an election at all* between the principal and real contestants, who embraced decidedly the greater number and substantial body of the employees, and between whom the real contest for the choice of the collective bargaining agency

lay. And Respondents, further therein, requested and petitioned the Board that the run-off election be held in the manner so requested by them. Respondents objected to the election as suggested by the Board, which, if so held, *would utterly deny and deprive them of their rights to participate in an election for the choice of a collective bargaining representative, as provided for and secured to them by the National Labor Relations Act, as well as by their fundamental legal rights.* Respondents, further in said writing, requested an opportunity to be heard by the Board if it entertained any doubt as to the propriety of Respondents' position.

The Board, after oral argument before it on the question of including Respondent, the Brotherhood Local, as a contestant and candidate on the ballot in the contemplated election, entered, on March 1, 1939, its final Order, called Supplemental Decision and Second Direction of Election (R. 21 to 25), denying the request of, and the relief sought by, the Respondents in their letter and petition of February 11, 1939, and in the argument on their behalf to the Board.

By its said Supplemental Decision and Second Direction of Election of March 1, 1939, the Board ordered a so-called "election", *in which the employees in the appropriate unit should be given the opportunity to decide "whether or not they desired to be represented by U.W.O.C" (the CIO Union)*; that such an *election by secret ballot* be conducted within forty-five days from the date of said Order, *to determine whether or not they desired to be represented by Utility Workers Organizing Committee (the CIO Union)* for the purposes of collective bargaining.

On March 15, 1939, the Board notified Respondents that the said alleged election would be conducted on April 11, 12, 13 and 14, 1939.

On April 5, 1939, Respondents, claiming to have been aggrieved by the Order, as stated hereinabove, petitioned the United States Circuit Court of Appeals for the Sixth Circuit to review the Order and set it aside, and requested said Court to stay the "election" directed and ordered to be held, as aforesaid, until the final determination of the matters and questions raised in and by their Petition, which stay was, by said Court, granted on April 10, 1939 (R. 50).

The Circuit Court of Appeals, on June 28, 1939, set aside the Order complained of; and the Board, on August 1, 1939, filed its Petition in this Honorable Court praying that a Writ of Certiorari issue to review and reverse the judgment of the Court below.

On behalf of the Respondents, and in opposition to the Petition of the Board for a Writ of Certiorari it is respectfully submitted, and will be hereinafter more fully urged, that the Petition of the Board for a Writ of Certiorari should be denied because the Court below, in its said decision, did not err in any of the particulars specified by the Petitioner, or otherwise, but correctly decided the questions presented by the case; and because the several and various prerequisites to certiorari do not obtain in this case.

ARGUMENT.

I.

The Decision of the Court below is not, as claimed by Petitioner, in conflict with the decisions of other Courts of Appeals. None of such other decisions, cited by Petitioner, involved or presented circumstances or questions essentially similar to those in this Case, which involve an Order by which the Board illegally and finally deprived Employees of the right to select, by Election, Representatives of their own choosing for Collective Bargaining—the Cardinal Right given Employees by the Act for their own benefit and protection and to effectuate its avowed policy.

The Petitioner urges upon this Court that the decision of the Court below is in conflict with the decisions of other Courts of Appeals, citing four decisions of other federal appellate Courts and one of the Court below. All of those decisions involve the question of the review, under the Act, of *certifications* issued by the Board, and none of them involves or presents circumstances or questions analogous to those in the instant case.* The admitted facts support this differentiation.

The Board's Order of March 1, 1939, which the Court below set aside, directed an "election" by the employees of the Company of a representative for collective bargaining, *and specifically ordered and required the use at the "election" of a secret ballot from which the name*

* One of the cases cited by the Board, *Unlicensed Employees of Sabine Transportation Co. v. National Labor Relations Board*, (C. C. A. 5), decided November 12, 1937, without opinion, is unreported, and the Respondents have been unable to ascertain either the questions presented therein or the reasons for the dismissal of the proceedings. The meager statement of the case in *Commerce Clearing House, Labor Law Service*, referred to by Petitioner, throws no clear or real light on that case.

of the Respondent, the Brotherhood Local, was to be entirely excluded and omitted, and upon which *only* the name of the CIO Union was to appear, so that the electors *had to vote solely and exclusively for or against the CIO Union, with no other or alternative expression or choice*. This requirement of the Board, which was promulgated under Section 9 (c) of the Act, was characterized by the Court below as follows (R. 54):

> "We think the order was *illegal* and that the proposed election was unfair in effect. It was in the teeth of the policy formulated in the statute, that the employees should be protected in the exercise of full freedom of designation of representatives of their own choosing. The employee was not given full freedom of choice. If he voted he could either ratify or reject the nominee of the Board, but if he rejected it he was through. He had no alternative—he could not choose for himself. He could take the representative offered him or none at all—a parallel of Hobson's choice."

The Petitioner, in its attempted analogy between the circumstances in the decisions cited by it and those in the instant case, as well as in its argument generally throughout its Petition for Certiorari, misses and disregards the essential point of the whole matter, namely, the *harmful illegality* of the Order, which was in *perversion and denial of the right of an election*, as contradistinguished from an order providing *for an election*, or a certification of facts or findings based upon an *election*. The *denial* of an *election*, under the pretense that an election is being provided for and secured, whether under the mask of an investigation or a certification, is a wrong operating instantly and finally to the injury and prejudice of the employees in question.

and, if not arrested and remedied, inflicting permanent and irreparable injury upon such employees. The Petitioner's claims in this case, which would usurp and appropriate the powers and functions of judicial review by the Courts of Appeals, and oust and exclude said Courts from control and remedy, under the Act, of any and every illegality which the Board may perpetrate *against employees*, as distinguished from employers, are, it is respectfully submitted, plainly as intolerable as they are untenable.

Petitioner cites, as being in conflict with the decision in the instant case, *Combustion Engineering Co. v. National Labor Relations Board*, 95 F. (2) 996, in which the Court below on March 18, 1938, in a memorandum decision, dismissed a petition for review of an order of the Board. No reasons are assigned by the Court below in said memorandum decision for its action, but it is apparent, merely from the title of that case, that relief was there sought by a *company or employer*, and not by employees in an effort to protect themselves against infringement of their supremely important and specifically guaranteed rights, *fundamental in their nature*, under the Act, as here. Moreover, and importantly, as will be shown in the discussion herein upon the intent of Congress as evidenced by the Congressional Reports referred to in the Board's Petition, it seems plain that whatever limitations were intended by Congress to be placed upon the right to judicial review, under the Act, were intended to be placed upon the right of *employers* to such review, and not upon the right of *employees* to the review of *illegal* orders of the Board depriving such *employees* of their rights to their final and irrepara-

ble injury. As the Court below, on this point, said (R. 55):

> "In this situation (where no unfair labor practice is involved), does this court have jurisdiction to review the order complained of, which as we have pointed out, *destroys* the right of petitioners, guaranteed by Sec. 7 of the Act, in the exercise of full freedom to bargain collectively with the Company through representatives of their own choosing? We think it does. *We cannot think that the Congress overlooked this important matter.* * * * This essential property right was not only guaranteed but was safeguarded; otherwise the Act itself would be subject to serious inquiry as to whether it violates the due process clause of the Fifth Amendment."

Cupples Company Manufacturers v. National Labor Relations Board, 103 F. (2) 953 (C. C. A. 8), (which relies for its holding upon *American Federation of Labor v. National Labor Relations Board*, 103 F. (2) 933, and *United Employees Ass'n. v. National Labor Relations Board*, 96 F. (2) 875, all three of which cases involve *certifications* of the Board and are cited by Petitioner as being in conflict with the decision below) plainly concerns a situation totally unlike that presented here because there no element of *impropriety or illegality* was alleged in or in connection with the order of the Board therein which "directed that as a part of the investigation to ascertain representatives for the purpose of collective bargaining, an election by secret ballot should be conducted at such time as the Board might specify, among the employees in a unit found by the Board to be appropriate for purposes of collective bargaining". *Without anything whatever* in the *Board's Order* to indicate any element of *illegality, deprivation*

or prejudice with reference to either employer or employees, the Court in that case could hardly escape the conclusion that the investigation, *as to which no impropriety of any sort was complained of or revealed*, had not reached the state of a final order directed against the Petitioner, *the employer*, and that, until it had reached that stage, the *petitioning employer* was not entitled to a review or hearing in that Court.

The *United Employees Association* case, *supra*, likewise furnishes neither indication nor suggestion of *illegality* on the part of the Board, and, both in the questions presented and the facts involved therein, is totally unlike the instant case. There the petitioner for review was a labor organization *already under a bargaining agreement with the employer*, and the *certification* of a rival organization, which was the act of the Board complained of, did *nothing*, in itself, to change the existing relationship between the petitioner and the employer. And, in the real and genuine election there held, *the rival union actually had received a majority of the votes of employees designated as having been eligible to vote.*

The decision of the Court of Appeals for the District of Columbia in the *American Federation of Labor* case, which is pending in this Court on Petition for Certiorari,* clearly is based upon the supposed analogy of cases dealing with the Urgent Deficiencies Act, which, it is submitted, are not applicable to cases dealing with administrative acts, as here, where provision for review

* Subsequent to the rendition of the judgment in the instant case on June 28, 1939, the Board filed a Memorandum in *American Federation of Labor, et al., v. National Labor Relations Board*, No. 70, October Term, 1939, in which the Board, although contending that the decision of the United States Court of Appeals for the District of Columbia was plainly correct, nevertheless states that it joins in the Petitioners' request that a Writ of Certiorari be granted.

is made *within the Act itself*. That case cites, as authority for its holding that the certificate of the Board there was not reviewable, *Shannahan v. United States*, 303 U. S. 596, which case, together with *United States v. Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, both involving the Urgent Deficiencies Act, were rejected as unauthoritative in *Pacific Power & Light Co. et al. v. Federal Power Commission*, 98 F. (2) 835 (C. C. A. 9) which was affirmed by this Court in *Federal Power Commission v. Pacific Power & Light Co., et al.*, 307 U. S. 156, and it also relies upon *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, which likewise dealt with an order of the Commerce Commission. It is submitted that, exclusive of the obvious factual differences between the *American Federation of Labor* case and the instant case, which are hereinafter pointed out, the holding in the former case has been overruled by the decision of this Court in the *Pacific Power & Light Company* case (and in *Rochester Telephone Corp. v. United States*, 307 U. S. 125, and *United States v. Maher, etc.*, 307 U. S. 148), which makes a clear distinction between the scope of the review of orders of administrative boards under administrative acts containing *in themselves* provisions for such review, and the Commerce Act, which does not, and whose orders must be reviewed under the Urgent Deficiencies Act. And other arguments may be advanced to show such distinction, for example, that the review afforded by the Urgent Deficiencies Act is limited to cases of public interest (see *Griffin v. United States*, 303 U. S. 226, 234); that while the regulatory authority of the Commerce Commission is general and comprehensive, *that of the National Labor Relations Board is defined and limited by the scope and provisions of the Act*; and that as the

congressional committees must have been familiar with the terms of the Commerce Act, containing no provisions for review of orders of the Interstate Commerce Commission, and the limited review of such orders afforded by the Urgent Deficiencies Act, it was intended in the National Labor Relations Act to provide for a new and more comprehensive review of administrative orders representing a distinct departure from the Urgent Deficiencies Act.

Referring to the factual distinctions between the *American Federation of Labor* case and the one at bar, it should first be noted that the main contention of the petitioning unions there was as to the designation by the Board of the appropriate unit for purposes of collective bargaining, *which the Board is, by Section 9 (b) of the Act, expressly given full discretionary powers to determine.* But the cardinal distinction between the situation in that case and the one at hand, in view of the authorities hereinafter cited which establish that the finality of an order for purposes of its review is determinable by consideration of the extent to which rights are denied or abridged thereby, is that *there the successful union actually embraced in its membership a majority of employees eligible to vote in the unit designated as the appropriate one.* In other words, in that case the certificate issued by the Board did not abridge the rights of the petitioning unions to represent employees in collective bargaining, as did the Second Direction of Election here, because the successful union there was actually preferred by a majority of the eligible employees, whilst in the instant case the *right* of Respondents *to represent* employees of the Company was, by said Second Direction of Election, *completely and finally*

precluded in spite of the determination, at the original election, that the CIO Union represented less than a majority of eligible employees and less than a majority of those voting.

Nothing but an utter confusion of thought could *compare*, or fail to *contrast*, the situations in the cases cited by the Board, as being in conflict with the Court below, with the circumstances involved here, or the *certifications* in those cases with the *Order* complained of herein, which allowed only a strictly limited *veto* in lieu of an *election*—the whole thing a contraption which illegally *denied* an election, instead of legally *permitting* one.

The Board, in its Petition for Certiorari (p. 10), in reliance upon the holdings in the several *certification* cases which it cites, argues that: "If a certification—the final step in a representation proceeding—is not reviewable, a *direction of election*, which is a preliminary instruction by the Board to its own subordinate officials to take certain proceedings as part of the investigation concerning representation, *a fortiori*, is not reviewable". That position of the Board *herein* is manifestly both *inapposite* and *fallacious*, because the Board's Order was *not* a "*direction of election*," but the *denial and prevention* of an *election*—the fundamental right guaranteed to employees by the Act. And aside from that and other fallacies in the Board's position on this point, shown herein, another obvious and decisive answer to it is given in the Opinion of the Court below, wherein it is said (R. 55):

> "Respondents insist that the order is not final, but it *was final not only in its effect* but *in that it was the last order to be made under the procedure set out in the Act for the determination of represen-*

tatives of employees for the purposes of collective bargaining with the Company. It is true that if the election had been held it was the duty of the Board to certify the result; *but a certificate is not an order.*"

II.

The so-called "Election" by a ballot eliminating the Brotherhood Local and restricting the Employees to vote only for or against the CIO Union, is not an Election within the meaning of the Act, and the Order directing it illegally deprived Respondents and their members of rights dominantly provided for their benefit and protection by the Act, and for the effectuation of its purposes, and secured against deprivation by the Act and the Fifth Amendment.

The Board's Order *specifically prescribed and required the use, at the "election", of a secret ballot from which the name of the Respondent, the Brotherhood Local, was to be entirely excluded and omitted* and upon which *only* the name of the CIO Union was to appear. so that the electors would have to vote solely and exclusively for or against that Union, with no alternative choice. Of the whole number of 2,977 voters in the appropriate unit, *all* who did not wish to vote for the CIO Union, *including all who did wish to vote for the Brotherhood Local,* were reduced and restricted to a *mere veto* of the CIO Union, and were depriyed of the essentials of the right of real *election.*

This one-sided, unfair and discriminatory contrivance would have *permitted* some voters *to* express their choice, and *prohibited* large numbers of other voters *from* expressing their choice. The very large number of those so discriminated against by the prohibition of

an expression of choice upon their part is manifested by the fact that at the last preceding election there were 2,977 eligible voters, of whom 1,164 voted for the CIO Union, 1,072 for the Brotherhood Local, 506 for Neither, and the balance, 235, cast either no ballots at all or ineffective ballots.

The Board's Order, excluding and outlawing all those employees and voters in the appropriate unit who might want to vote for the Brotherhood Local, thus clearly terminated and destroyed the right of the Brotherhood Local to represent its members and other employees of the Company in collective bargaining, and the right of the members of the Brotherhood Local, who constitute a large and substantial portion of the employees of the Company, as well as other employees, to vote for it as their representative. In these respects the Board's Order plainly took away the *personal rights* of Respondents and their members, as well as those rights which this Court, in *Texas and New Orleans Railroad Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548, 571, adjudicated to be *property rights*.

Dr. Francis Lieber's luminous discussions of this subject, with historic illustrations, in his classic, *Civil Liberty and Self-Government*, are forcibly in point. See pages 392; 393; 420, 421; 434; 435.

In the First Annual Report of the National Labor Relations Board, for the Fiscal Year ended June 30, 1936, referring to the National Labor Relations Act and particularly its "Policy and Provisions", at page 9, the Board declares that "The Act, in its substantive and procedural provisions * * * makes *no departure from traditional*

principles of substantive law or statutory administration". And referring to the rights of employees guaranteed by Section 7, to self-organization and to bargain collectively through *representatives of their own choosing*, etc., and to the provisions of Section 9, relating to representatives and elections, it is further said by the Board:

> 4. Representatives and Elections. Since collective bargaining is carried on through *representatives* of employees, *the act follows established precedents for the factual determination of such representatives.* Section 9 (a) provides that *representatives selected by the majority of employees in a unit appropriate for collective bargaining* shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining. *The act thus affirms the majority-rule principle, which is inherent in the practice of collective bargaining as in the practice of dealing through representatives generally, whether for governmental, corporate or other purposes.*
>
> "Section 9 (b) authorizes the Board to determine in the appropriate case whether, *in order to secure to employees the full benefit of their right to self organization and collective bargaining, and otherwise to effectuate the policies of the act*, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.
>
> "In order to resolve in an orderly way doubts as to the representatives of employees, the Board is specifically empowered to investigate questions concerning the representation of employees, *to conduct elections in appropriate cases*, and to *certify* to the parties the *name or names of the representatives that have been designated* (Sec. 9 (c))."

And see also particularly Sections 1, 7 and 9 of the Act itself for its strong declarations on this subject.

It is submitted that the Act in conferring upon and vesting in employees in the appropriate unit the right to elect, and, in the exercise of such right of election, to choose, select and designate by a secret ballot of such employees, and by a majority of them, the exclusive representation of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment, and in expressly providing that the Board shall "*insure to employees the full benefit of their right to collective bargaining*", and in declaring it to be the policy of the United States, for the purposes of said Act, to encourage the practice and procedure of collective bargaining "by protecting the exercise by workers of *full freedom of * * * designation of representatives of their own choosing*, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection", and in again emphatically enacting in Section 7 that employees "*shall have the right * * * to bargain collectively through representatives of their own choosing* for the purpose of collective bargaining or other mutual aid or protection", intended as one of the principal, if not the principal, means of securing to employees the benefits, protection, security and relief designed by the Act in their behalf and in the general public interest, *that said employees should have free, full and unrestricted elective franchise, or suffrage, to be exercised by ballot, in the choice, selection and designation by them of their representatives for collective bargaining.* Moreover, it is clear that such elective franchise or suffrage, in its nature, scope and essentials,

and particularly in its fullness, freedom and unrestrictedness, and in its relation to the majority-rule principle, *is analogous to the elective franchise or right of* suffrage, as declared by the Report of the Board hereinbefore quoted, for "*governmental, corporate or other purposes*", and, with respect to which, as the Board's Report also states, "the Act, both in *its substantive and procedural provisions * * * makes no departure from traditional principles of substantive law or statutory administration.*"

It is thus plain that a predominant purpose of the Act, for the effectuation of its express policies, was *to insure, beyond denial or abridgement, upon the part of either employers or the Board itself, full, free and untrammeled action upon the part of said employees in the choice or election of their representatives for the supreme and vital purposes of collective bargaining.*

The plain, established meaning and import of the terms employed in the Act in this connection, namely, "choose", "select", "designate", "election", "ballot", "of their own choosing", "selected by the majority," "the full benefit of their right to collective bargaining", all consistently and uniformly lead to the one conclusion that the right of election so conferred was a right of *affirmatively choosing* by vote a person or organization to fill and exercise the office of representative for collective bargaining, and that when the voter or elector, as in this case, is deprived, in whole or in part, of his full right of exercising his own choice, selection and designation of the representative in question, he loses his elective franchise as the same is intended to be vouchsafed to him by the Act.

The *result and effect* of the Board's Second Direction of Election set aside by the Court below was that Respondents were *finally defeated and outlawed* at a previous election by the votes of far less than a majority of employees eligible to vote in the election.

This principle of majority, as against minority, rule, as maintained in the Act, has been recognized by the Board not only in the above quoted excerpts from its First Annual Report, but also in other expressions, as on page 108, in said Report.

That the Board would not afford recognition to an organization representing less than a majority of those eligible employees voting is likewise plain from *Matter of Associated Press*, 1 N. L. R. B. 686, where the Board said:

> "A majority of those eligible voted; a majority of those voting, though less than a majority of those eligible, voted for the American Newspaper Guild. In certifying the Guild we are following the rule established by the Circuit Court of Appeals for the Fourth Circuit in *Virginian Railway Co. v. System Federation No. 40*, decided June 18, 1938. The Court had before it the provision in the Railway Labor Act, 45 U. S. C. Sec. 131, *et seq.*, that: 'The majority of any craft or class shall have the right to determine who shall be the representative of the class or craft'. It decided that where a majority of the eligibles voted, a majority of those voting, though less than a majority of those eligible, determined the representative.
>
> "After pointing out that the popular democratic government is universally conducted upon that principle and alluding to the many decisions of the Supreme Court applying the principle to political elections, the Court says:

"'We see no reason why the Act should not be interpreted as contemplating that this well settled rule of elections should be applied in the case of the employees' election for which it provides, in cases like this where a majority of those qualified to vote participate in the election. Such a rule is fair and just to all parties. *It gives every employee an opportunity to express his choice.* It preserves the secrecy of elections. *And it prevents the breaking down of collective bargaining which it was the purpose of the Act to set up.*'

"With these reasons we are in entire accord. The parallel language in the National Labor Relations Act: 'Representatives designated or selected * * * by the majority of the employees in a unit' differs slightly but not materially from that in the Railway Labor Act and requires the same construction."

Virginian Railway Company v. System Federation No. 40, etc., referred to by the Board in its opinion above, was subsequently affirmed by this Court (300 U. S. 515) which, alluding to the majority-rule principle embodied in Section 2, fourth, of the Railway Labor Act, which section had been by the Board analogized to the parallel Section in the National Labor Relations Act, said, speaking through Mr. Justice STONE (p. 560):

"It is to be noted that the words of the section confer the right of determination upon a majority of those eligible to vote, but is silent as to the manner in which that right shall be exercised. Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election. *Carroll County v. Smith*, 111 U. S. 556; *Douglass v. Pike County*, 101 U. S. 677; *Louisville & Nashville*

R. Co. v. County Court of Davidson County, 1 Sneed (Tenn.), 637; *Montgomery County Fiscal Court v. Trimble*, 104 Ky. 629, 47 S. W. 773. Those who do not participate are presumed to assent to the expressed will of the majority of those voting. *Cass County v. Johnston*, 95 U. S. 360, 369; and see *Carroll County v. Smith, supra.*"

It is thus clearly seen that what was actually done by the Board's Supplemental Decision and Second Direction of Election, in contravention of the majority-rule principle inherent in the Act, as the Board itself has construed it, was to allow on the ballot to be used at the "election" the name of *only* a labor organization which was definitely in the minority in the original election of January, 1939, and to exclude and omit the Respondent, the Brotherhood Local, which was in precisely the same minority class as the CIO Union as the result of said original election, thus denying to said Respondent, and depriving it and its members of, their rights expressly guaranteed to them by the Act and by the due process clause of the Fifth Amendment.

III.

Definition of an Election and its Essentials.

In the Standard Law and General Dictionaries and in numerous Judicial Decisions, the following definitions are given:

Black's Law Dict. (2nd ed.), p. 415: "Election. The act of choosing or selecting one or more *from a greater number* of persons, things, courses or rights. * * * "The selection of one man *from among several candidates to* discharge certain duties in a state, corpora-

tion, or society. *Maynard v. District Canvassers*, 84 Mich. 228, 47 N. W. 756; *Brown v. Phillips*, 71 Wis. 239, 36 N. W. 242; *Wickersham v. Brittan*, 93 Cal. 34, 28 Pac. 792."

The Encyclopedia Britannica, 11th edition, vol. IX, title Election, page 169: In "the legal sense it is confined to the selection by the preponderating vote of some properly constituted body of electors of one *of two or more candidates*, sometimes for admission only to some private social position (as in a club), but more particularly in connection with public representative positions in political government."

See also to the same effect:

Bouvier's Law Dictionary (1926 ed.): "Election."

20 Corpus Juris, Elections, p. 55.

Webster's Twentieth Century Dictionary, p. 541: "Election."

Worcester's Dictionary of the English Language (1888), p. 409: "Election."

The New Century Dictionary (1927): "Election."

State v. Hays, 91 Miss. 755, 45 So. 728, (citing *Foster v. Scarff*, 15 Ohio 532).

Brown v. Phillips, 71 Wis. 239, 36 N. W. 242 ("the act of selecting one or more from others").

Hudgins v. State, ex rel. A. T. Hicks & Co., 145 Ala. 499; 39 So. 717 ("the act of electing one or more from others").

State v. Cahill, 131 Iowa 155; 105 N. W. 691 ("the choice or selection of *one man amongst more* to fill a certain office").

Maynard v. Board of Dist. Canvassers, 84 Mich. 228; 47 N. W. 756.

Bowler v. Eisenhood, 1 S. D. 577; 48 N. W. 136 (*"the selection of one man from amongst more* to discharge the duties in a state, corporation, or society").

Wickersham v. Brittan, 93 Cal. 34; 28 Pac. 792.

State v. Hirsch, 125 Ind. 207; 24 N. E. 1062.

People v. Board of County Canvassers of Onondaga County, 129 N. Y. 395; 29 N. E. 327.

People v. Crissey, 91 N. Y. 616, 634-635 (the Court declared that the person voted for was not elected, saying *"an election implies opportunity to re-elect or choose another, and such was not given. It is a misnomer to call such a proceeding an election"*).

IV.

An Election to be legal and valid must be free, fair and untrammeled; must be impartial, equal and undiscriminating with respect to the electors and their rights, and must not deny, abridge or impede the full exercise and enjoyment of their suffrage.

In *Cooley's Constitutional Limitations* (8th ed.), at page 1370, *et seq.*, it is said:

> "All regulations of the elective franchise, however, must be reasonable, uniform and impartial; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, they must be declared void. * * *
>
> "The mode of voting in this country, at all general elections, is almost universally by *ballot*. * * * The system of ballot voting rests upon the idea that *every* elector is to be *entirely at liberty* to vote *for* whom he pleases and with what party he pleases.

and that no one is to have the right, or be in position, to question his independent action, either then or at any subsequent time.

In *People v. McCormick*, 261 Ill. 413, 103 N. E. 1053, Ann. Cas. 1915 A, 338, the Court said:

> "Since the constitution has declared that all elections shall be free, each elector is *entitled* to cast his vote *for* any eligible person for any office provided by the Constitution *free from any restraint* not authorized by the Constitution itself. The legislature may determine the manner of conducting elections and the means of ascertaining and declaring the result, *but it has no right to interfere with the freedom of choice, which is the meaning of freedom of election. It is essential to the freedom of elections mentioned in the Constitution that every voter shall be permitted to choose from all eligible persons and shall not be required to choose from certain classes.*"

In the leading case of *State v. Dillon*, 32 Fla. 545, 14 So. 383, 22 L. R. A. 124, it was held that "in requiring an official ballot, the voter cannot be restricted to the candidates whose names are printed. He must be allowed to vote for whom he pleases."

And see the exhaustively considered case of

Jackson v. Norris, 173 Md. 519, 195 Atl. 576, and cases cited.

And also:

20 *Corpus Juris, Elections*, pp. 62 and 140.
10 *Amer. and Eng. Enc. of Law*, p. 576.
Page v. Allen, 58 Pa. St. 338.
Atty. Gen. v. Detroit, 78 Mich. 545.

V.

The settled and familiar Principles declared in the aforegoing Authorities have been expressly applied to the Elections of Representatives secured to Employees in the Federal Labor Acts.

In *Virginian Railway Company v. System Federation No. 40*, 84 F. (2) 641 (C. C. A. 4), affirmed by this Court in 300 U. S. 515, it is said, in the Opinion of the Circuit Court of Appeals:

> "One purpose of the Railway Labor Act, as amended, was to assure *free and untrammeled* action on the part of the employees in the *choice of their representatives* for the purpose of *collective bargaining*.
>
> "The *right* of self-organization and *representation* in the matter of rates of pay, hours of labor, and working conditions is a *property right*, the loss of which would result in irreparable damage to complainants. *Texas and N. O. R. Co. v. Brotherhood of Ry. and S. S. Clerks*, 281 U. S. 548.
>
> "It (the Act) merely prescribes the political principle of majority rule. Another section of the Act provides the means of determining the majority, *the political device of the secret election. * * * The universal rule as to elections of officers and representatives is that a majority of the votes cast elects*, and that those not voting are presumed to acquiesce in the choice of the majority who do vote. * * * Such a rule is fair and just to all parties. *It gives every employee an opportunity to express his choice.*"

In *National Labor Relations Board v. A. S. Abell Co.*, 97 F. (2) 951 (C. C. A. 4), the Court said:

> "The *choice* between Union and Committee was presented to the men; *its free exercise was guaran-*

teed in the 'right to self-organization' and '*to bargain collectively through representatives of their own choosing*' conferred by Section 7 of the Act, 29 U. S. C. A. sec. 157".

VI.

The Board's Second Direction of Election, denying rather than providing for, a Legal and Valid Election by the Employees of the Company, and operating definitively and destructively upon Respondents' rights, secured to them by the Act, and protected against any infringement by the Fifth Amendment to the Constitution, is a final Order, judicially reviewable as such under Section 10 (f) of the Act.

A.

As the Act, itself, fully demonstrates that the Employees' right of collective bargaining, through representatives of their own choosing, is the Act's principal and predominant purpose and means of effectuating it, and that the prevention of the proscribed unfair labor practices is integrally connected with and essentially ancillary to said principal and predominant purpose, it follows that the broad provisions for judicial review, under Section 10 (f) of the Act, properly and necessarily include jurisdiction and control by such review of orders of the Board destroying said major right of employees to collective bargaining in violation of said purpose of the Act.

The avowed Policy and Purpose of the Act, its Provisions and their correlation, and the settled Canons of Statutory Construction, it is respectfully submitted, fully sustain the interpretation of the Act stated above.

The National Labor Relations Act in all its parts and provisions, the public statement of President Roosevelt when he signed the Act, the reports and declarations of the Board, and the decisions of this Court, demonstrate the integral connection and relationship between the provisions of the Act securing to employees collective bargaining through representatives of their own choosing, as the Act's predominant purpose and effectuating means, and the prevention of impediments to that purpose consisting of the unfair labor practices which the Act proscribes, the prevention of which is ancillary to the Act's said principal purpose of maintaining an unprejudiced right to collective bargaining, and indicate the unity and indivisibility of the Act in its policy, intent, substance and remedial provisions, and establish beyond doubt, that in all the unfair practices, which it prohibits, the protection and security of collective bargaining are, directly or indirectly, involved; or *e converso*, the maintenance of the Act's cardinal objective and remedy of collective bargaining involves and requires the prevention of the denounced unfair labor practices. In other words, the policy, intent, substance and structure of the Act and the plainly designed coherence and adaptation of all its provisions to the supreme and general object and remedy which it repeatedly avows, show that the broad remedial jurisdiction vested by the Act in the Circuit Courts of Appeals, by judicial review, to confine the Board's orders within the Act and the fundamental law, properly and necessarily includes jurisdiction and control, by such review, of the Orders of the Board, not only with reference to the prohibited unfair labor practices, *but also with reference to the major and supreme right of the employees to collective bar-*

gaining through independent representatives of their own free choosing. Any other construction would be protecting by judicial review and control the incidental and auxiliary right of the employee as against the employer, whilst abandoning and leaving wholly unprotected, and without judicial protection and redress under the Act, the principal and vital right of the employee (the very right to which the suppression of the unfair labor practices is incidental and auxiliary) as against the Board itself.

The *President of the United States*, on approving the Act (see footnote, p. 9, of the Board's First Annual Report), made the following statement:

> *"The Act defines, as part of our substantive law, the right of self-organization of employees in industry for the purpose of collective bargaining, and provides methods by which the Government can safeguard that legal right.* It establishes a National Labor Relations Board to hear and determine cases in which it is charged that *this legal right is abridged or denied*, and to *hold fair elections to ascertain who are the chosen representatives of employees.*
>
> *"A better relationship between labor and management is the high purpose of this act. By assuring the employees the right of collective bargaining, it fosters the development of the employment contract on a sound and equitable basis.* By providing an *orderly procedure* for determining who is entitled to represent the employees, it aims to remove one of the chief causes of wasteful economic strife. *By preventing practices which tend to destroy the independence of labor, it seeks, for every worker within its scope, that freedom of choice and action which is justly his.*"

In its said Report, the Board itself, referring to the "Policy and Provisions" of the Act, declares:

> "The Act, both in *its substantive and procedural provisions, remedies the defects disclosed by experience under previous statutes, and at the same times makes no departure from traditional principles of substantive law or statutory administration.*
>
> "1. *Findings and policy.*—Section 1 of the act, after setting forth the *effect of unfair labor practices and labor disputes* upon the free flow of interstate commerce, *concludes in these terms, which summarize the theory underlying the entire statute:*
>
> "Experience has proved that *protection by law* of the *right of employes to* organize and *bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employes.*
>
> "It is hereby *declared to be the policy of the United States to eliminate the causes* of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by *encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.*"

The Board's said Report next proceeds to set forth and discuss the "Rights of Employees" as follows:

> "3. *Rights of employees.—Section 7 reaffirms* long recognized *fundamental rights* enjoyed by *American workers*, as follows:
>
> "*Employees shall have* the *right* to self-organization, to form, join or *assist labor organizations, to bargain collectively through representatives of their own choosing*, and to engage in concerted activities, *for the purpose of collective bargaining* or other mutual aid or protection.
>
> "SECTION 8 IMPLEMENTS THESE RIGHTS BY ENUMERATING AND PROHIBITING CERTAIN SPECIFIC UNFAIR LABOR PRACTICES BY EMPLOYERS. *These may be briefly summarized as follows* * * *

The precise provision of Section 8 (3) upon this subject is particularly noteworthy with reference to the special subject matter under present consideration. The proviso of the Section is that nothing in the Act, or in the National Industrial Recovery Act, etc., shall preclude an employer from making an agreement with a labor organization (*not established, maintained, or assisted by any action defined in this Act as an unfair labor practice*) *to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a) in the appropriate collective bargaining unit covered by such agreement when made.* It will be noted that *two conditions* are *here closely grouped together as the bases upon which closed shop agreements between the employer and the employees are authorized, namely, that the agreement be by a labor organization which is the representative of the employees in the appropriate collec-*

tive bargaining unit, elected under Section 9 of the Act; and, second, that such labor organization be not established, maintained or assisted by an unfair labor practice. Thus, even unto the detail of authorizing a closed shop agreement, the Act closely connects the representative chosen under Section 9 as the collective bargaining representative of the employees with the prohibition of unfair labor practices interfering with the rights and the independence of the employees, which collective bargaining is provided, by the Act, to protect and secure.

The Board's Report next takes up the subject of *Representatives and Elections*, upon which it states:

> "4. *Representatives and elections.*—Since *collective bargaining* is carried on *through representatives of employees*, the act follows *established precedents for the factual determination of such representatives. Section 9 (a) provides that representatives selected by the majority of employees in a unit appropriate for collective bargaining shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. The act thus affirms the majority-rule principle, which is inherent in the practice of collective bargaining as in the practice of dealing through representatives generally, whether for governmental, corporate, or other purposes.*
>
> "Section 9 (b) authorizes the Board to determine in the appropriate case whether, in order *to insure to employees the full benefit of their right to self-organization and collective bargaining, and otherwise to effectuate the policies of the act*, the unit *appropriate for the purposes of collective bargaining* shall be the employer unit, craft unit, plant unit, or subdivision thereof.
>
> "In order to resolve in an orderly way doubts as to the *representatives of employees*, the Board is

specifically empowered to investigate questions concerning the representation of employees, *to conduct elections in appropriate cases*, and to certify to the parties the name or names of the *representatives that have been designated* (sec. 9 (c))."

In full and exact accord with the declaration of President Roosevelt in giving his approval to the Act, and with the declarations of the Board itself, above quoted, are the manifest Intent of the Statute and the uniform contributing purposes of its several Sections.

Every provision of the Act testifies unmistakably that *collective bargaining* by the employees, through representatives of their own choosing, with the employers, upon the vital subjects of wages, hours, and all other material conditions of employment, *is the prevention of and remedy for the evils and mischiefs which the Act was passed to suppress, including the prevention of and remedy for all forms of unfair labor practices which it proscribes.* Instead of, as the Board in its Petition contends, *separating* collective bargaining by the employees through independent representatives of their own choosing from prohibited unfair labor practices, whereby the Act would be divided into two different and independent subject-matters with respect to its policy, substance and remedies, and with respect to the status and functions of the Board under it, the Act *integrates inseparably the two subjects*, the provision and security of collective bargaining being the *principal* subject-matter, and the prevention of unfair labor practices, as adversely interfering with collective bargaining and the accomplishment of its avowed objects, being the *incidental* subject matter. Construed according to Lord Coke's leading and familiar canon of statutory construction, that is,

to suppress the mischief and advance the remedy, the Act, in all its closely connected and coherent statements of the evils to be overcome, its declarations of policy, the general and paramount remedy it provides, its ancillary and particular prohibitions to accomplish its general and principal purpose, its manifest intent that all its provisions, both affirmative and prohibitory, are deliberately correlated and designed to *effectuate* its policies by protecting the employees in the rights granted to them and prohibiting and preventing evils which destroy or threaten those rights, reveals its interrelated, integral and indivisible nature in its substantive, procedural and remedial features.

As President Roosevelt tersely, but effectively, stated:

> "This Act defines, as part of our substantive law, the *right* of self-organization of employees in industry for *the purpose of collective bargaining*, and provides *methods* by which the *Government can safeguard that legal right*."

In brief, the Act itself declares and demonstrates the close causal and remedial connection between collective bargaining by freely chosen representatives and the prevention of unfair labor practices, actually setting up such collective bargaining as the main means of preventing, and itself the potential prevention of, unfair labor practices denounced by the Act.

In full harmony, as above stated, with the elucidating declarations, above quoted, of the President and of the Board, are the title, the preambles or keynotes of Section 1, as well as the express literal enactments of Section 2, Section 7, Section 8, Section 9 and Section 10 of the Act, to which especial attention of the Court is here respectfully asked.

The following Sections of the Act, it is submitted, lend exceptionally strong support to the construction herein contended for on behalf of these Respondents:

Section 7 of the Act, captioned "Rights of Employees", provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, *to bargain collectively through representatives of their own choosing*, and to engage in concerted activities, *for the purpose of collective bargaining* or other mutual aid or protection."

Section 8 shows that the main and principal unfair labor practice proscribed and put down by the Act is any interference with the employees in the exercise of their right to bargain collectively through representatives of their own choosing or to organize in concerted activities for the purpose of collective bargaining. It is perfectly plain, therefore, that *the prevention* of unfair labor practices, involving, directly or indirectly, interference with the right of employees to bargain collectively through representatives of their own choosing, is basically and broadly intended for the protection and security of the employees in the free and full exercise of that right.

Section 8 (2), prohibiting the employer from interfering with the formation or *administration* of any labor organization, has also a perfectly apparent relation to the right of employees to bargain collectively through representatives of their own choosing for the purposes of collective bargaining, although not as close and direct as the relation of 8 (1) thereto.

Section 8 (3), in several respects, also has a plain and close relationship to the right of employees to bargain

collectively, declared in Section 7, inasmuch as "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization" would undeniably be an interference with employees' rights of collective bargaining through representatives freely chosen, guaranteed by Section 7. And the other respects in which Section 8 (3) is related to collective bargaining, secured by Section 7, with regard to closed shop agreements, and with relation to Section 9 (a), have hereinabove been pointed out. Section 8 (5) has in express terms to do directly with collective bargaining with the representatives of the employees, subject to the provisions of Section 9 (a).

Under the caption, and dealing with the subject of "Representatives and Elections", Section 9 (a), (b), (c) and (d) shows the integral connection between representatives and elections and unfair labor practices, demonstrating the uniform, pervading thesis of the Act to outlaw and repress various unfair practices as conflicting and interfering with the supreme right of the employees to designate and select, for the purpose of collective bargaining, representatives of their own choosing, and to "insure to employees the full benefit of their right" to collective bargaining and to effectuate the policies of the Act, and to take a secret ballot of the employees whereby they may designate and select their representatives for that purpose, and to secure a review, upon the entire record required to be filed under Sections 10 (f) and 9 (d), of an order of the Board aggrieving them and praying the Court to modify or set aside such order in whole or in part.

It is respectfully submitted that the aforegoing discussion cogently demonstrates that the *remedial and corrective jurisdiction* conferred by *Section 10* of the Act upon Courts of Appeals to review, and to enforce, modify or set aside, the orders of the Board is, by the supreme policy and the cardinal purpose of the Act, and the interrelation of all its provisions for the effectuation of its policy and purpose, fully commensurate with, and broadly covers and includes, *everything which the Act requires or prohibits for the effectuation of its policies and purposes*, and that, accordingly, the remedies, pursuant to review, which Section 10 authorizes and directs the said Courts to apply, are not limited and technical, but embrace the complete and harmonious enforcement of the whole Act, together with the fundamental law of the land, including every order of the Board, which finally affects employers, employees, organizations, individuals, or "persons", whose rights under or with respect to the Act are, in violation of it or the organic law, denied or impaired.

As "unfair labor practices" are denounced and prevented by the Act manifestly and undeniably for the purpose of protecting and securing the employees' right to bargain collectively through representatives freely chosen, in elections specially provided for that purpose, and as the objects of such collective bargaining are to protect the employees in their vital concerns of wages, hours of work, and all other conditions of employment, to which objects, and the interests of the employees therein, the prohibited unfair labor practices have direct and essential relation, it would be not only a violation of every sound precept of statutory construction, but, with great deference it is submitted, of plain, irresistible

common sense, to confine and restrict the jurisdiction of the Courts of Appeals, and the judicial remedies which that jurisdiction is conferred to provide, to merely the *subordinate and incidental* subject-matters of the Act, and utterly exclude from the whole sphere of such judicial remedy the *paramount and predominant rights* which it is the main purpose of the Act to vouchsafe to the employees, and, for the inviolate maintenance of which against denial or interference, the repression of unfair labor practices is commanded.

The immemorial canons of statutory construction conclusively sustain the construction and application of the Act here respectfully maintained, on behalf of Respondents, to be true, sound, legal and just. There is no more firmly settled or familiar canon of statutory construction than that the intent of the statute is to be ascertained from the whole statute, and that, when so ascertained, the intent is the statute, and will be read, wherever possible, harmoniously throughout the Act into all of its provisions.

In *Potter's Dwarris*, at pp. 188-189 (see also p. 184), it is said:

> "It is the most natural and genuine exposition of a statute, to construe one part by another part of the same statute, for that best expresses the meaning of the makers; and such construction is *ex visceribus actus*. And this construction of itself imports *ex vi termini*. * * *"

In 2 *Lewis' Sutherland, Statutory Construction*, 2nd Ed., Sec. 344, pp. 659-660, it is said:

> "It is to be presumed that all the subsidiary provisions of an act harmonize with each other, and with

the purpose of the law; if the act is intended to embrace several objects, that they do not conflict. Therefore, it is an elementary rule of construction that all parts of an act relating to the same subject should be considered together, and not each by itself. *By such a reading and consideration of a statute its object or general intent is sought for, and the consistent auxiliary effect of each individual part.* Flexible language which may be used in a restricted or extensive sense will be construed to make it consistent with the purpose of the act and the intended modes of its operation as indicated by such general intent, survey and comparison—*ex antecedentibus et consequentibus fit optima interpretatio.*"

To the same effect are Sections 348, 363 and 364. In Section 363, pp. 693-5 of the same volume of the same Work, it is said:

> "The intent of a statute is the law.—If a statute is valid it is to have effect according to the purpose and intent of the law maker. * * * In construing statutes the proper course is to start out and follow the true intent of the legislature and to adopt that sense which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the legislature.' "

See also:

Section 364, pp. 696-7; Section 368, pp. 706-7; Sections 369, 380 and 444.

Endlich on the Interpretation of Statutes, Sections 27, 29, 103, 295 and 339.

59 *Corpus Juris*, Statutes, pp. 961 and 993.

As shown above, the construction of the Act contended for by the Board divides the Act itself into two entirely separate and radically different parts—one, those provisions of the Act applicable to unfair labor practices by

employers as to which the Board contends the right and remedy of judicial review exists; and two, separate and different from the first, that part of the Act which secures to employees their vital and paramount rights of choosing the representatives for collective bargaining as to which the Board contends there is no remedy and no relief afforded by the Act to protect, secure and enforce such cardinal rights of the employees. This is not only an anomalous construction of the Act, but would leave the Act in an anomalous state, making its administration unfair and ineffective with respect to the rights of the *employees* in the Board's dealings with *them*, whilst effective as to the rights of the Board in dealing with *employers*. An appropriate characterization of the Board's position in this respect is found in the language of Mr. Chief Justice WHITE in *Pennington v. United States*, 231 U. S. 631, who said, in rejecting a construction sought to be placed upon a federal statute:

> "In other words, the only avenue of approach for the proposition is through a gateway created by *wrenching the provision asunder*. We are of opinion that this may not be done. (*White v. United States*, 191 U. S. 545; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174). * * * things may not be so associated as one for the purpose of securing the enactment of legislation upon the theory that they are one, and when enacted be disassociated for the purpose of judicial construction so as to cause them to be wholly independent of one another."

And it is, of course, a firmly established canon of construction that the *intention* of the law-maker is to be deduced from the *whole statute and every material part* of the same. *United States v. Fisher*, 2 Cranch 358; *United States, ex rel. Parrish, v. MacVeagh*, 214 U. S. 124; *Great*

Northern R. Co. v. United States, 208 U. S. 452; *Home Sav. Bank v. Des Moines*, 205 U. S. 503; *Blair v. Chicago*, 201 U. S. 400; *Lockwood v. Exchange Bank*, 190 U. S. 294; *Earle v. Carson*, 188 U. S. 42.

See also, for other expressions and applications of the principles of construction above stated:

Postmaster General v. Early, 12 Wheat. 136
Wood v. United States, 16 Pet. 342
Peck v. Jenness, 7 How. 612
Brown v. Duchesne, 19 How. 183
Heydenfeldt v. Daney Gold, etc. Co., 93 U. S. 634
Red Bird v. United States, 203 U. S. 706
Ross v. McIntyre, 140 U. S. 453
Fasulo v. United States, 272 U. S. 620
Talbott v. Silver Bow County, 139 U. S. 438.

B.

Apart from the reasons discussed hereinbefore, Section 10 (f) of the Act conferred jurisdiction upon the Court below to review the Board's Order, operating so destructively upon Respondents' cardinal rights under the Act. The construction of said Section, contended for by Petitioner, against judicial review, under the Act, of said Order, would unconstitutionally deprive Respondents of their valuable rights, and would make the Act, so applied, violative of the Fifth Amendment.

As the Board's Order illegally and finally deprived the Respondents of basic rights given them by the Act for their benefit and for the effectuation of the policy of the Act, it is respectfully contended that said Order was, under the plain terms of Section 10 (f) of the Act, which confers exclusive and comprehensive appellate jurisdiction upon Courts of Appeals, properly reviewable by the

Court below. If the words of that Section are given their natural meaning it would seem beyond question that the Court below clearly had jurisdiction under it, because Respondents were persons "aggrieved" by an "Order" of the Board which irretrievably denied to and deprived them of valuable personal and property rights, and denied "in whole" the relief they sought from the Board in their letter and Petition of February 11 (R. 17) to it and in their oral argument before it on February 24, 1939. And, inasmuch as the Sixth Circuit, throughout which the jurisdiction of the Court below extends, embraces Michigan, where both Respondents "reside or transact business", the Court below plainly had jurisdiction as provided by Section 10 (f).

Petitioner contends that the Act, Section 10 (f), confers jurisdiction upon Courts of Appeals to review *only* cease and desist orders *against employers* made in unfair labor practice cases. One obvious answer to that contention is that there is no express language in Section 10 (f) limiting or restricting the broad grant of jurisdiction to review contained therein to only such orders as Petitioner contends are reviewable, and it would require an artificial and strained interpretation of, and an unwarranted interpolation of words into, the plain language of the Section to transmute the words *"a final order of the Board granting or denying"* etc., into the words *"a final cease and desist order of the Board against an employer in an unfair labor practice case granting or denying"* etc. If Congress had intended to limit and restrict the jurisdiction of the Courts of Appeals to the review of only a cease and desist order against an employer in an unfair labor practice case, it would have used appropriate words of limitation and

restriction to that effect upon the comprehensive language of Section 10 (f). As the Court below, in denying the Board's contention on this point, so cogently stated (R. 55):

> "Finally, it is said (by the Board) that the phrase 'Wherein the unfair labor practice in question was alleged to have been engaged in' found in Sec. 10 (f), limits the right of judicial review to procedure involving unfair labor practices only, as described in Sec. 10 of the Act. It certainly permits a review of the procedure in such character of controversy *but does not confine it thereto.*
>
> "The Supreme Court did not so limit it in *Edison Co. v. Labor Board*, 305 U. S. 197, 226. See also the discussion touching jurisdiction under Sec. 10 (f) found in *In re Labor Board*, 304 U. S. 486, 493; and in *Ford Motor Co. v. Labor Board*, 305 U. S. 364, 369."

In *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, this Court, through Mr. Chief Justice HUGHES, in construing Section 10 (f) of the Act said (p. 369):

> "While Section 10 (f) assures to *any aggrieved person* opportunity to contest the Board's Order, it does not require an unnecessary duplication of proceedings. The aim of the Act is to attain simplicity and directness both in the administrative procedure and on judicial review. * * * *The breadth of the jurisdiction conferred upon the court to set aside or modify in whole or in part the Board's Order, or to permit new evidence to be taken, necessarily implies that the party proceeded against is entitled to raise all pertinent questions and to obtain any affirmative relief that is appropriate.* * * *"

Furthermore, the position and contention of Petitioner that no right of review of its own violations of Section

9 (a) and (c) exists in such a case as this, where the *employees* have been denied their vitally paramount right of election of a representative of their own choosing for collective bargaining, and that the *only* right of review is one relating solely and exclusively to questions of unfair labor practices by *an employer*, would leave the Act in the anomalous state of providing remedy by court review for only unfair labor practices by the *employer*, and of utterly failing to provide remedy respecting the *rights of employees* which the Act secures and declares to be as of supreme importance to *them*. *In other words, the Board contends that violations of the Act against employees upon the Board's own part are not subject to remedy by judicial review, and may not be remedied or relieved against, within the provisions of the Act.* The position of the Board is that *employees*, who can not, under the provisions of the Act, commit unfair labor practices, but *against whom the Board may violate the provisions of the Act*, are *without remedy against the Board*; that the Board may enforce relief against *employers*, and *employers* may challenge the action of the Board in that respect, *but that no matter how illegally the Board may act in dealing with the rights of employees, the latter may not, within the provisions of the Act, hold the Board accountable or within judicial control.* It is submitted that every conception of justice, as well as every fair interpretation of the Act, must instinctively reject such a contention. The construction of the Act so contended for by the Board would make the Act, as applied to a situation such as the one in this case, unconstitutional as in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

I. B. E. W. v. National Labor Relations Board, 305 U. S. 197; 232-233; 233.
Morgan, et al., vs. United States, 304 U. S. 1.
St. Joseph Stock Yards v. United States, 298 U. S. 38.
Morgan v. United States, 298 U. S. 468.
Southern R. Co. v. Virginia, 290 U. S. 190.
Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287.
Turner, et al., v. Wade, etc., 254 U. S. 64, 70.
Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 457, 458.
Interstate Commerce Comm. v. Louisville & N. R. Co., 227 U. S. 88.

Moreover, the construction contended for by the Board arbitrarily *divides* the Act itself into *two* entirely separate and radically different parts, first, those provisions of the Act which the Board, in its unaccountably narrow view of the Act itself, holds only applicable to *unfair labor practices by employers*, as to which the Board concedes the right and remedy of judicial review exist; and second, separate and different from the first, that part of the Act which secures to *employees* their vital and paramount rights of choosing their representatives for collective bargaining, as to which the Board contends there is no remedy and no relief afforded by the Act to protect, secure and enforce such cardinal rights of employees, which the contention of the Board most strangely and repulsively maintains are entirely subject to the discretionary, arbitrary, ultimate and irreviewable determination and fiat of the Board alone. This is not only at war with every conception of American law, and not only an anomalous construction of the Act, but would emasculate the Act to a semi-abortive state, leaving its

administration ineffective with respect to the rights of the *employees* in the Board's dealings with *them*, whilst effective only with respect to the rights of *employers* and the *powers of the Board* in controversies arising *between them*.

It is submitted that this contention of Petitioner is *condemned*, and that the contention made by Respondents, as Petitioners in the Court below, for relief, protection and remedy against violations and denial of their vital rights under Sections 7 and 9, and under the policy of the Act, is *sustained*, by the broad, plain provisions of Section 10 (f) of the Act, which give the right, unrestrictedly, to any person aggrieved by a final order of the Board, granting or denying in whole or in part the relief sought, to obtain a review of such order.

I. B. E. W. v. National Labor Relations Board, 305 U. S. 197; 232-233; 233; 234-235; 236-237.

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1; 32-34; 42; 42-45.

In re Labor Board, 304 U. S. 486, 493.

Ford Motor Co. v. National Labor Relations Board, 305 U. S. 364, 369.

Texas & New Orleans R. Co. v. Brotherhood of R. etc. Clerks, 281 U. S. 548.

Virginian R. Co. v. System Federation No. 40, 300 U. S. 515.

Federal Power Comm. v. Pacific Power & Light Co., et al., 307 U. S. 156.

Rochester Telephone Corp. v. United States, 307 U. S. 125.

United States v. Maher, etc., 307 U. S. 148.

Federal Radio Comm. v. Nelson Bros. Bond & Mtge. Co., 289 U. S. 266.

American Sumatra Tobacco Corp. v. Securities and Exchange Comm., 98 F. (2) 236 (Ct. App. Dist. Col.).
Heitmeyer v. Federal Communications Comm., 95 F. (2) 91 (Ct. App. Dist. Col.).
Pacific Power & Light Co., et al., v. Federal Power Comm., 98 F. (2) 835 (C. C. A. 9).

C.

The Congressional Reports relied on by Petitioner have no relation to and do not support its construction of the Act against the right of Respondents to Judicial Review thereunder of the Direction of "Election," but said Reports show merely a legislative intention to restrict Judicial Review only as against procrastinating and objectionable tactics of employers, and relating to orders providing for elections, and not to orders denying and preventing elections and illegally and finally denying employees their vital rights involved therein.

Petitioner seeks to justify the construction it places upon the Act against the right of Respondents to judicial review thereunder of the Direction of "Election" by quotations from the Reports of the Committees of the Senate and House of Representatives which considered the Bill which became the National Labor Relations Act. It is submitted, however, that those Reports merely demonstrate that, whatever limitations were intended by Congress to be placed upon the rights of *employers* to judicial review under the Act of *election* orders, not the least intention is expressed in, or may be implied from, said Reports to deny or proscribe the rights of *employees*, as persons aggrieved within the broad language of Section 10 (f) of the Act, to judicial review of orders of the Board *illegally denying, instead of providing for, elections* of representatives for collective bargaining.

That the intent of Congress upon the subject was to prevent *employers* and *companies* from interposing vexatious and procrastinating appeals from orders *directing elections* is the plain and true purport of the texts of the Reports selected and quoted by Petitioner; but any intent to deny to *employees* the right to review, by the Courts of Appeals, under the Act, of orders of the Board depriving such *employees*, by means of an *illegal device improperly designated by the Board* an *"election"*, of vital rights specifically designed to secure to them their basic and principal right under the Act, is not even intimated in the Reports of either of the Branches of Congress.

For example, in the Report of the House Committee (H. Rept. 1147, 74th Cong., 1st Sess., pp. 6-7) referring to the procedure providing for judicial review under Public Resolution 44, 73d Cong., 2d Sess. (48 Stat. 1183) of election orders of the Old Board, it is said:

> "The weakness of this procedure is that under the provision for review of election orders *employers* have a means of holding up the *election* for months by an application to the circuit court of appeals.
> * * *
> "The *election* is but a preliminary determination of fact, and there is no reason why *employers* should have an opportunity for court review prior to the holding of the *election*. The ability of *employers* to block *elections* has been productive of a large measure of industrial strife. When an employee organization has built up its membership to a point where it is entitled to be recoginzed as the representative of the employees for collective bargaining, and the *employer* refuses to accord such recognition, the union, unless an election can promptly be held to determine the choice of representation, runs the risk

of impairment of strength by attrition and delay while the case is dragging on through the courts, or else is forced to call a strike to achieve recognition by its own economic power. * * *"

The Report of the Senate Committee on Education and Labor, S. Rept. 573, 74th Cong., 1st Sess., pp. 5-6, declares that:

"Under Public Resolution 44, any attempt by the Government to conduct an *election of representatives* may be contested *ab initio* in the courts, although such election is in reality merely a preliminary determination of fact. * * * After almost a year not a single case, in which a *company* has chosen to contest an *election* order of the Board, has reached decision in any circuit court of appeals."

In the Report of the House Committee above referred to, after referring to actual cases, it is said (p. 7):

"* * * The *companies* in these cases had made every preparation to wage a war with striking employees, *rather than to submit to the orderly democratic process of a governmentally supervised election to determine by whom the employees desired to be represented in collective bargaining negotiations.*"

The position of the Board, in so far as it relies upon the language contained in the Congressional Reports above quoted from, is plainly based upon the false premise that the Order in the instant case is identical with those referred to in said Reports, namely, an order *providing for* an election by employees of representatives, *designated and selected by their own free choosing*, for collective bargaining, or, as stated in the House Report, an "orderly *democratic process* of a governmentally su-

pervised *election*"; whereas in fact, as shown hereinbefore, the Order complained of and which was directed to be set aside by the Court below does *not* "direct an *election*" at all, but *effectually denies and prevents an "election" in any established, just or legal sense of the term.* So that, whatever may be said of the contents of the Reports above referred to as limiting or restricting the right to judicial review under the Act, the manifest reference of Congress was to the *democratic process of election*, and orders passed *therefor*, and *not* to such an Order, as is here involved, which neither directs nor provides *for an election*, but *denies* it and its essential rights and elements.

The submission by Petitioner of said Reports in support of its contentions simply begs the question, because the very question presented for decision below was whether the so-called "election" was an election at all within the meaning of the Act and its purpose and policy, and within the admitted meaning that Congress, following well established and familiar principles, intended to impute to the word *election*.

The definitions of the word "election" (*supra*, pp. 24 to 26), convey the accepted and established meaning of the word, and Congress must certainly be taken to have intended its accepted and established meaning when it employed the word "election". In its accepted and established sense it is true that, as stated in the excerpt quoted above from the Senate Report, "An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of the employers or employees", but when, as here, one of the candidates is denied and deprived of the right to appear

upon a ballot to be used at an "election", and the right is denied to the voting employees to *express* their choice for a representative "*of* their own choosing", then, it is respectfully submitted, such "election" is *not* the mere determination of a preliminary fact, or any fact at all, but *is* a determination denying and destroying rights not only of eligible electors—in this case the eligible employees—but also of eligible candidates, including in this case the Respondent, the Brotherhood Local, whose name was excluded from a place upon the ballot.

D.

The Board's Second Direction of Election was a final order which conclusively and irretrievably denied to and deprived Respondents of their personal and property rights to their irreparable injury.

The fact that the Second Direction of Election was not called by the Board either an order or a final order did not and could not have affected its nature or its finality. Just as an interlocutory or preliminary direction will not be converted into a final order simply by characterizing it as such, a final order may not be made an interlocutory, preliminary or procedural one by designating it a decision or direction. The true test of finality, adhered to in the federal decisions from the inception of the rule in this Country that only final orders will be reviewed on appeal, is that whether an order or decree is final is not to be determined by the name by which it is called, but by its substance, its inherent nature and its effect.

The Second Direction of Election was an Order because it promulgated a rule, a regulation and a command, and

ordered, directed and required what it promulgated to be carried out. It was definitive, rather than preliminary or procedural, because it determined absolutely and conclusively, and ordered, directed and required, how the run-off "election" was to be held and how the ballot to be used at the run-off "election" was to read, that is, with a choice on it for or against the CIO Union, and with the name of the Respondent, the Brotherhood Local, entirely excluded and omitted therefrom. It was definitive, moreover, in so far as Respondents were concerned, because there was no further procedure or step that could have been taken by Respondents under the Act or the Board Rules and Regulations to alter, change or vary the terms and provisions of the Supplemental Decision and Second Direction of Election. All possible remedies within the Act and the Rules and Regulations had been resorted to and exhausted, except the remedy provided for review by the Court below. The Second Direction of Election was not preliminary because, under its mandate and requirements, the rights of Respondents, in so far as any possibility existed of becoming the representative for collective bargaining at the "election" to be held for that purpose, were terminated. The holding of the so-called run-off "election", whether the CIO Union would have won or lost, and whether or not the Board would ever have been called upon to certify the CIO Union as representative, could not possibly have affected or changed the altered position of Respondents as it was affected by the Board's Order, in so far as their rights were concerned. No further step which might have been taken by anyone before the Board would have made the position of Respondents any more or less mature than it became by virtue of the operation and affect

of the Supplemental Decision and Second Direction of Election.

The Supplemental Decision and Second Direction of Election were entered and issued in a proceeding which was clearly adversary in character, in that the contentions and application of Respondents as to the manner and form of the run-off "election", as stated in their letter and petition of February 11, 1939, and in the oral argument in their behalf before the Board, were opposed by the Board itself as well as by their competitor for the position of representative for collective bargaining, the CIO Union, as is shown in the letters to the Board in its behalf of February 2 and February 6, 1939, *requesting a ballot in the run-off election for or against the CIO Union.*

In its Petition for Certiorari the Board (p. 11) refers this Court to the Memorandum filed by it in *American Federation of Labor v. National Labor Relations Board*, No. 70, *supra*, in which the Board, in an extended argument, in contending that the *certification* involved in that case was not judicially reviewable under the Act, maintains that administrative action which affects rights only on the contingency of future administrative action, or which does not command that anything be done or not done, is not reviewable judicially, citing, in support of that position, *United States v. Los Angeles, etc., R. Co.*, 273 U. S. 299, which case was cited and relied upon in the Court below by Petitioner in the instant case.

As shown hereinabove, the *American Federation of Labor* case is clearly distinguishable from the one at bar in several important respects which will not be repeated here. It is further respectfully submitted that the *Los*

Angeles Railroad Company case, in which review of a finding of the Interstate Commerce Commission was sought under the Urgent Deficiencies Act, is clearly inapplicable for a number of reasons. First, the Court there said, concerning a *valuation finding* of the Commission, that it was "merely preparation for *possible action* in some proceeding which *may be instituted* in the future". In the instant case the Supplemental Decision and Second Direction of Election were entered and issued *as a result* of a proceeding distinctly adversary in its nature, which proceeding was instituted, heard and determined prior to the entering and issuing of the same, and the only things which remained to be done thereafter were ulterior proceedings (wherein Respondents were actually and finally deprived of their rights under the Act) to carry out and execute the mandate of the Board. In the *Los Angeles* case, counsel for it conceded that the finding there did *not* require the Railroad Company to "*do or refrain from doing some specific thing*", the contention there being that such a direction was not necessary (see argument for Company in that case, 273 U. S. 299, 303). In that case, to quote the language of the Court, the finding did not "grant or *withhold any authority, privilege or license*", nor "*extend or abridge any power or facility*", nor "*change the carrier's existing or future status or condition*", nor "*determine any right or obligation*". *In the case at bar, the Board's Order does all of those things.*

Equally as important, as a distinguishing factor between the *Los Angeles* case and the case at hand, is the fact that the provisions of the Urgent Deficiencies Act of 1913 (28 U. S. C., Secs. 45 and 47a), under the provisions of which review of the Commission's findings was there sought, are not at all analogous to Section 10 (f) of the

Act here. Nor is the Commerce Act comparable to the National Labor Relations Act, because the former contains no provision whatsoever for review. In cases construing review provisions similar to those in the Act here involved, such as *Federal Power Commission v. Pacific Power & Light Co., et al.*, 307 U. S. 156, and *American Sumatra Tobacco Corp. v. Securities and Exchange Commission*, 93 F. (2) 236, in which the doctrine of negative orders, under the *Los Angeles* case and other cases under the Urgent Deficiencies Act, was advanced and relied upon by administrative boards in opposition to judicial review, the obvious differences between the Commerce Act and the Urgent Deficiencies Act, on the one hand, and administrative acts *containing within them* review provisions, on the other, have uniformly impelled the Courts to reject, as not even persuasive, such decisions concerning orders or findings of the Interstate Commerce Commission. In the *Pacific Power & Light Company* case, *supra*, the Court, speaking through Mr. Justice FRANKFURTER, said:

> "But the Power Act *contains* a distinctive formulation of the conditions under which resort to the Courts may be made and Congress determines the scope of jurisdiction of the lower federal courts. * * * Thus the *statutory scheme* of the Power Act only reinforces the analysis made in the *Rochester* case."

See also:

Rochester Telephone Corp. v. United States, 307 U. S. 125.

E.

The finality of the Second Direction of Election, for purposes of its reviewability under the provisions of the Act, is determinable by its actual operation and effect, and the substantiality of the rights which it abridges or denies.

The fact that the so-called run-off "election" had not been held, and that there remained to be done certain administrative or procedural acts before the completion of the investigation being conducted by the Board, in no wise detracted from the intrinsic nature and effect of the Second Direction of Election, or from its finality within the meaning of the words "final order" used in the Act. The authorities are in entire accord on that proposition.

In what is perhaps the leading case on this subject, *Forgay, et al., v. Conrad*, 47 U. S. 201, this Court, speaking through Mr. Chief Justice TANEY, affirmed the rule that the words "final decrees", used in acts of Congress relating to the reviewability of decisions of lower courts, are to be given a liberal and reasonable construction, and that if an order be final upon the merits of a matter in dispute, and may not be reconsidered or modified by the Court passing it, in relation to the matters decided, although there remain in the cause further or ulterior proceedings, such order is nevertheless final and appealable, particularly if irreparable injury will result to the aggrieved party, from the operation of such order, during the pendency of such ulterior proceedings.

In *United States v. River Rouge Co.*, 269 U. S. 412, this Court, speaking through Mr. Justice SANFORD, said (p. 414):

> "While the general rule requires that a judgment of a federal court shall be final and complete before it may be reviewed on a writ of error or appeal, it is well settled that an adjudication final in its nature as to a matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy, may be reviewed without awaiting the determination of the general litigation. *Williams v. Morgan*, 111 U. S. 684, 689; *Collins v. Miller*, 252 U. S. 364, 371; *Arnold v. Guimarin*, 263 U. S. 427, 434. And so, conversely, an adjudication final in its nature as to the general suject of the litigation may be reviewed without awaiting the determination of a separate matter affecting only the parties to such particular controversy."

In *Thompson v. Dean*, 74 U. S. 342, the decision of this Court, per Mr. Chief Justice CHASE, denying a motion to dismiss the appeal, was to the same effect, as are the decisions of this Court in:

Clark v. Willard, 292 U. S. 112.
Wilson v. Republic Iron Co., 257 U. S. 92.
Waco v. U. S. Fidelity Co., 293 U. S. 140.
Bandini v. Superior Court, 284 U. S. 8.
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McAllister v. C. & O. Ry. Co., 243 U. S. 302.
Wecker v. Nat'l. Enameling Co., 204 U. S. 181-182.

And see also:

St. Louis, etc., R. Co. v. Southern Express Co., 108 U. S. 24.
Hill v. Chicago & Evanston R. Co., 129 U. S. 170.
Mowrer v. Fletcher, 114 U. S. 127.
Bronson v. Railroad Co., 67 U. S. 524.
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Ormsby v. Webb, 134 U. S. 47.
Ex Parte Norton, 108 U. S. 237.
O'Dowd v. Russell, 81 U. S. 402.
French v. Shoemaker, 79 U. S. 86.

In *Rose on Fed. Juris. & Proc.* (4th Ed.), Sec. 651, it is said on this subject:

"Our Courts have tried to make the test a *practical* one. They are inclined to hold a decree or order final and therefore, appealable, *if it requires something to be done which takes aught of substantial value from one of the parties, and if that which is commanded cannot be undone by any subsequent reversal.* * * * Speaking generally, however, whether a decree is final or not will be tested rather by *what will be its actual working than by purely theoretical considerations.*"

In 4 *Foster Fed. Pr.*, Section 695, p. 3740, *et seq.*, are given many examples of orders, analogous to that in the instant case, which were held to be final and reviewable on appeal.

In *Zoline on Fed. Appellate Jur. & Proc.* (3rd Ed.) p. 18, it is said:

"* * * An adjudication is final and appealable if it involves a determination of a substantial right

against a party in such a manner as leaves him no adequate relief except by appeal * * * Whether a decree is final or interlocutory depends upon its essential purport and effect and not upon its characterization in the proceedings (*Simmons v. Grier Bros. Co.*, 258 U. S. 82). * * *"

See also:

Montgomery's Manual of Fed. Juris. and Proc., (3rd Ed.), Section 1011.

CONCLUSION.

Accordingly, it is respectfully submitted, for the Respondents herein, that the Petition of the National Labor Relations Board for a Writ of Certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 253.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876.

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Argument:

I. The so-called "Election" by a Ballot excluding the Brotherhood Local and restricting the Employees to vote only for or against the CIO Union, is not an Election within the meaning of the Act, and of settled General Law, and the Order directing it illegally deprived Respondents and their Members of rights dominantly provided for their benefit and protection by the Act, and for the effectuation of its purposes, and secured against deprivation by the Act and the Fifth Amendment 19

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The settled and familiar Principles declared in the foregoing Authorities have been expressly applied to the Elections of Representatives secured to Employees in the Federal Labor Acts 33

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predominant purpose and means of effectuating it, and that the prevention of the proscribed unfair labor practices is integrally connected with and essentially ancillary to said principal and predominant purpose, it follows that the broad provisions for judicial review, under Section 10 (f) of the Act, properly and necessarily include jurisdiction and control by such review of orders of the Board destroying said major right of employees to collective bargaining in violation of said purpose and effectuation of the Act 34

B. Apart from the reasons discussed hereinbefore, Section 10 (f) of the Act conferred jurisdiction upon the Court below to review the Board's Order, operating so destructively upon Respondents' cardinal rights under the Act. The construction of said Section, contended for by Petitioner, against judicial review, under the Act, of said Order, would unconstitutionally deprive Respondents of their valuable rights, and would make the Act, so applied, violative of the Fifth Amendment. 52

C. The Decision of the Court below is not, as claimed by Petitioner, in conflict with the decisions of other Courts of Appeals. Assuming the correctness of all such other decisions, cited by Petitioner, none of them involved or presented circumstances or questions essentially similar to those in this Case, which involve an Order by which the Board illegally and finally deprived Employees of the right to select, by Election, Representatives of their own choosing for Collective Bargaining—the Cardinal Right given Employees by the Act for their own benefit and profection and to effectuate its avowed policy 62

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 253.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876.

OPINIONS BELOW.

The Opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 44 to 48), filed June 28, 1939, is reported in 105 F. (2) 598. The Supplemental Decision and Second Direction of Election of the National Labor Relations Board (R. 14 to 18), entered and issued by the Board on March 1, 1939, are reported as 11

N. L. R. B., No. 63. The Decision and Direction of Election of the National Labor Relations Board entered and issued by the Board on November 8, 1938 (R. 28 to 36), as amended November 23, 1938 (R. 37), are reported in 9 N. L. R. B. 742, and the Second Amendment thereto of December 22, 1938 (R. 38 to 41), is reported in 10 N. L. R. B. 780.

JURISDICTION.

In its Petition for Certiorari the Petitioner invoked the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. In its principal Brief (p. 2) the Petitioner states that the jurisdiction of this Court rests on said Section of the Judicial Code and Section 10(f) of the National Labor Relations Act.

QUESTIONS PRESENTED.

The Petitioner's statement, in its Brief herein, of the questions presented to this honorable Court for decision, varies its statement of those questions in its Petition for Certiorari, and, moreover, formulates two questions, each in abstract and inapposite form, which do not express, but tend to obscure, the actual and precise questions presented, and, furthermore, defines them otherwise than as they were presented and argued by the parties in the Court below.

The actual questions presented to and decided by the Court below were:

1. Did the ballot prescribed by the Board's Order of March 1, 1939, for the directed so-called "Election" by the employees of the Consumers Power Company, deny and, in effect, destroy the highly important and vital

right of said employees to the *Election, which the Act,* in its main policy and purpose, secures to them, to *select and designate representatives of their own choosing* for collective bargaining?

2. Whether, under and within the provisions of the National Labor Relations Act, the Circuit Courts of Appeals have jurisdiction to review and set aside an Order of the National Labor Relations Board, which finally and irreparably *denies* to *employees,* whose rights the National Labor Relations Act was passed to protect and secure, supremely valuable rights granted to them by the principal provisions of the Act and secured to them by the Fifth Amendment?

3. Are the Respondents (established and nationally recognized Labor Unions of employees) under Section 10(f) of the National Labor Relations Act, as said Section, like all other provisions of the Act, is to be read and enforced so as to effectuate its predominant policy and purposes, entitled to judicial determination by the Circuit Courts of Appeals of basic and serious questions whether the National Labor Relations Board has *violated* the Act by Orders which, finally and beyond redress, deprive *employees* in large numbers of valuable rights granted to them, and secured against deprivation, by the Act itself, as well as by the Fifth Amendment?

STATUTES INVOLVED.

This cause involves questions arising under the Fifth Amendment to the Constitution of the United States and the National Labor Relations Act of July 5, 1935 (49 Stat. 449; U. S. C. Sup. II, Title 29, Section 151, *et seq.*).

STATEMENT.

The Statement contained in the Petitioner's Brief is, it is respectfully submitted, incomplete, and therefore the Respondents submit the following statement of the case.

The proceeding in the Court below was by Respondents' Petition to review and set aside the Board's Order, designated Supplemental Decision and Second Direction of Election, entered on March 1, 1939.

The Respondents, as persons aggrieved by the Order, pursuant to Section 10(f) and Section 9(d) of the Act, complained of it as illegally and finally depriving them of supremely important rights granted them by the Act for their own benefit and protection and to secure and effectuate the dominant policy of the Act.

The Board filed a Motion to Dismiss (R. 24 to 27) the Petition, thus admitting, for the purposes of the proceeding, all allegations of said Petition for Review upon which the relief it prayed was based. On May 10, 1939, the case came on for final hearing before the Court below on the Board's said Motion to Dismiss, and was fully briefed and argued upon the merits by counsel for both sides (R. 48). On June 28, 1939, the Court below filed its Opinion and entered its Order setting the Board's Order aside (R. 43, 48).

The membership of the Respondent, the Brotherhood Local, consists of a large portion of the employees of the Consumers Power Company, an operating public utility corporation furnishing electric current and power in Michigan. The Brotherhood L . is a constituent of the Respondent, the International Brotherhood, affiliated with the American Federation of Labor. Other employees of the Company belong to a labor organization,

known as Utility Workers Organizing Committee, affiliated with the CIO.

On February 2, 1938, the Respondent, the Brotherhood Local, petitioned the Regional Director of the Board at Detroit, Michigan, requesting the holding of an election by the employees of the Company for the purpose of selecting a representative of their own choosing for collective bargaining with the Company. After considerable delay on the part of the Board, on December 22, 1938, it entered a Decision and Direction of Election (amending previous Decisions and Directions of Elections issued theretofore in said proceedings on November 8, 1938, and November 23, 1938, respectively), directing the Regional Director, within seventy days from November 8, 1938, to conduct an election by secret ballot among certain specified employees of the Company, to determine whether such employees desired to be represented by the Respondent, the Brotherhood Local, affiliated with the American Federation of Labor, or by Utility Workers Organizing Committee, affiliated with the Congress for Industrial Organization, for the purpose of collective bargaining, or by neither.

The following were the results of that election held January 10-13, 1939:

Total number of employees eligible	2,977
Total number of ballots cast	2,806
Total number of votes for International Brotherhood of Electrical Workers, Local 876	1,072
Total number of votes for Utility Workers Organizing Committee	1,164
Total number of votes for neither	506
Total number of challenged ballots	52
Total number of blank ballots	1
Total number of void ballots	11

Neither union having received a majority of the votes validly cast in the election, there was no representative elected.

On February 2 and February 6, 1939, *the CIO Union* requested the Board to direct a run-off election, to be expressly limited to *only* a choice *for or against the CIO Union*, and on February 8, 1939, the Board notified the Respondents that the Board would direct the holding of *such* a run-off election unless objection thereto was received within five days thereafter.

On February 11, 1939, the Respondents, through their General Counsel, informed and notified the Board, by letter and petition (see Respondents' Exhibit No. 1, R. 12 to 14), that they had no objection to the run-off election, if the contestants or candidates named upon the ballot used in the election were the two organizations, namely, the CIO Union, and the Respondent, the Brotherhood Local, which, respectively, had received the highest and the next highest number of votes in the election of January 10 to 13, 1939; further, that such condition was apposite and important with respect to the proposed run-off election, because intimations had been made, and rather widely circulated, by the CIO Union, that it only, or it and "Neither", would appear upon the ballot, without the name of the Respondent, the Brotherhood Local, appearing at all, whereby the employees would be deprived of voting for said Respondent, and such "election" of a collective bargaining agency to represent the employees of the Company would *not be an election at all* between the principal and real contestants, who embraced decidedly the greater number and substantial body of the employees, and between whom the real con-

test for the choice of the collective bargaining agency lay. And Respondents, further therein, requested and petitioned the Board that the run-off election be held in the manner so requested by them. Respondents objected to the election as suggested by the Board, which, if so held, *would utterly deny and deprive them of their rights to participate in an election for the choice of a collective bargaining representative, as provided for and secured to them by the National Labor Relations Act, as well as by their fundamental legal rights.* Respondents, further in said writing, requested an opportunity to be heard by the Board if it entertained any doubt as to the propriety of Respondents' position.

The Board, after oral argument before it on the question of including Respondent, the Brotherhood Local, as a contestant and candidate on the ballot in the contemplated election, entered, on March 1, 1939, its final Order, called Supplemental Decision and Second Direction of Election, denying the request of, and the relief sought by, the Respondents in their letter and petition of February 11, 1939, and in the argument on their behalf to the Board.

By its said Supplemental Decision and Second Direction of Election of March 1, 1939, the Board ordered a so-called "election", *in which the employees in the appropriate unit should be given the opportunity to decide "whether or not they desired to be represented by U.W.O.C." (the CIO Union)*; that such an *election by secret ballot* be conducted within forty-five days from the date of said Order, *to determine whether or not they desired to be represented by Utility Workers Organizing Committee (the CIO Union)* for the purposes of collective bargaining.

On March 15, 1939, the Board notified Respondents that the said alleged election would be conducted on April 11, 12, 13 and 14, 1939.

On April 5, 1939, Respondents, claiming to have been aggrieved by the Order, as stated hereinabove, petitioned the United States Circuit Court of Appeals for the Sixth Circuit to review the Order and set it aside, and requested said Court to stay the "election" directed and ordered to be held, as aforesaid, until the final determination of the matters and questions raised in and by their Petition, which stay was, by said Court, granted on April 10, 1939 (R. 42).

The Circuit Court of Appeals, on June 28, 1939, set aside the Order complained of; and the Board, on August 1, 1939, filed its Petition in this honorable Court praying that a Writ of Certiorari issue to review and reverse the judgment of the Court below, which Petition was, by this Court, granted on October 9, 1939.

On behalf of the Respondents it is respectfully submitted that the judgment of the Court below should be affirmed because the Court below did not err therein in any of the particulars specified by the Petitioner, or otherwise, but correctly decided the questions presented by the case.

SUMMARY OF ARGUMENT.

I. The so-called "election" by a ballot excluding the Brotherhood Local and restricting the employees to vote only for or against the CIO Union, is not an election within the meaning of the Act, and of settled general law, and the Order directing it illegally deprived Respondents and their members of rights dominantly

provided for their benefit and protection by the Act, and for the effectuation of its purposes, and secured against deprivation by the Act and the Fifth Amendment. The ballot required under the Board's Order directing the "election" would not be a legal ballot at all, but a one-sided, unfair and discriminatory contrivance, permitting some employees to express a choice but prohibiting large numbers of other employees from doing so. The very large number of employees so discriminated against is manifested by the fact that at the original election, at which 2742 valid ballots were cast, the plurality of the CIO Union over the Brotherhood Local was slightly more than 3% of the total number of employees eligible to vote. The Board's Order, excluding the employees who might want to vote for the Brotherhood Local, thus terminated and destroyed its right to represent its members and other employees in collective bargaining, and the right of the members of the Brotherhood Local, as well as other employees, to vote for it. In these respects the Order completely and finally took away personal as well as property rights. The ballot required by the Order actually substituted a *veto* for an *election*, and, in every probability, predetermined the result of the balloting. If the ballot required by the Order would be used, the term "election" would be a misnomer, as the proceeding would then be merely a "voting". Historic instances of such "votings" may be cited to exemplify that their results have always been without meaning.

The Board's Order is contrary to the purposes and policy of the Act and the principles of the Act's construction as they are avowed by the Board in its First Annual Report, wherein it declares that: "The Act, in its

substantive and procedural provisions, makes no departure from traditional principles of substantive law or statutory administration". The Board, in said Report, referring to the rights of employees, guaranteed by Section 7 of the Act, to self-organization and to bargain collectively through *representatives of their own choosing*, and to the provisions of Section 9, relating to representatives and elections, declares that "since collective bargaining is carried on through representatives of employees, *the Act follows established precedents for the factual determination of such representatives*," and the Board lays especial emphasis upon the fact that the Act affirms the majority-rule principle, which, it states, is "inherent in the practice of collective bargaining as in the practice of dealing through representatives generally, *whether for governmental, corporate or other purposes.*" This principle of majority, as against minority, rule, as maintained in the Act, has also been recognized and approved by the Board in its own decisions (*Matter of Associated Press*, 1 N. L. R. B. 686) which follow that doctrine as it was affirmed by this Court in *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515, 560.

The Act shows clearly, throughout all its provisions, particularly those insuring "to employees the full benefit of their right of collective bargaining" and "protecting the exercise by workers of full freedom of designation of representatives of their own choosing," that it was intended, as one of the principal means of securing the benefits of the Act, that employees should have free, full and unrestricted elective franchise, to be exercised by ballot, in the choice by them of their representatives for collective bargaining The elective franchise and

right of suffrage are not a mere and restricted franchise and right to vote *for or against some one, single candidate*, but consist of the *free exercise of a full, unabridged right to active and positive choice* of such representatives as each worker might desire to vote for.

The result of the Board's Order is that Respondents have been defeated, and their rights ultimately terminated and precluded, by less than a majority of the employees eligible to vote in the election, or, to be precise, by less than a majority of those voting. Conversely, the CIO Union has won the exclusive right to appear as sole candidate by having polled less than a majority of the votes cast. The Petitioner's claim that the effect of Respondent's contentions is to compel a form of ballot is based upon an erroneous conception of their position and an unwarranted interpretation of the Decision of the Court below. It was contended by Respondents, and found by the Court below, *only* that the ballot required by the Order directing the election would have been unfair and discriminatory.

Every definition of an election and its essentials shows that the proceeding or "voting" which would have been necessitated by the carrying out of the Board's Order would not have been a legal election at all. An election is the act of choosing or selecting one man from among several *candidates*, or one of two or more *candidates*, to discharge certain duties in a state, corporation or society, as contradistinguished from a *mere veto* such as was directed by the Board's Order in this case. An election to be legal and valid must be free, fair and untrammeled; must be impartial, equal and undiscriminating with respect to the electors and their rights, and

must not deny, abridge or impede the full exercise and enjoyment of their suffrage.

The settled and familiar principles declared in the general authorities relating to elections and their essentials have been expressly applied to the elections of representatives secured to employees in the Federal Labor Acts. *Virginian Railway Company v. System Federation No. 40, supra; National Labor Relations Board v. A. S. Abell Co.*, 97 F. (2) 951 (C. C. A. 4).

II. The Board's Second Direction of Election, denying, rather than providing for, a legal and valid election by the employees of the Company, and operating definitively and destructively upon Respondents' rights secured to them by the Act, is a final Order, judicially reviewable as such under Section 10 (f) of Act.

A. As the Act, itself, fully demonstrates that the employees' right of collective bargaining, through representatives of their own choosing, is the Act's principal and predominant purpose and means of effectuating it, and that the prevention of the proscribed unfair labor practices is integrally connected with and essentially ancillary to said principal and predominant purpose, it follows that the broad provisions for judicial review, under Section 10 (f) of the Act, properly and necessarily include jurisdiction and control by such review of orders of the Board destroying said major right of employees to collective bargaining in violation of said purpose and effectuation of the Act. The construction of the Act contended for by the Petitioner would be protecting by judicial review the *incidental* right of the employee as against the employer, whilst leaving wholly without judicial protection under the Act the *principal*

right of the employee as against the Board itself. Not only the Act, itself, but the statement of the President on approving the Act, the declarations of the Board, and the decisions of this Court construing the Act, reveal and establish unmistakably that collective bargaining by the employees through representatives of their own choosing, with their employers, is the prevention of and remedy for the evils which the Act was passed to suppress. Such collective bargaining may not be separated from the prohibited unfair labor practices, as Petitioner contends, so as to divide the Act into two independent subject-matters, because the Act *integrates inseparably* the two subjects, collective bargaining being the *principal*, and the prevention of unfair labor practices the *incidental*, subject-matter. It is thus plain that the prevention of unfair labor practices is basically intended for the protection and security of the employees in the full and free exercise of the right of collective bargaining. The remedial and corrective jurisdiction conferred by Section 10 of the Act upon Courts of Appeals to review, enforce, modify or set aside orders of the Board is fully commensurate with, and broadly covers and includes, everything which the Act requires or prohibits for the effectuation of its policies and purposes. Accordingly, the remedies, pursuant to review, which Section 10 authorizes the said Courts to apply, are not limited and technical, but embrace the complete and harmonious enforcement of the whole Act, including every Order of the Board, which finally affects employees or "persons" whose rights under the Act are, in violation of it or the organic law, denied or impaired. As the purpose of the prevention of unfair labor practices is to protect and secure the employees' right to bargain collectively through representatives freely

chosen in elections specially provided for that purpose, it would be a violation of every sound precept of statutory construction to confine and restrict the jurisdiction of the Courts of Appeals to merely the *subordinate and incidental* subject-matters of the Act, and exclude from judicial remedy the *paramount and predominant* rights which it is the main purpose of the Act to vouchsafe to the employees. The construction contended for by the Board arbitrarily *divides* the Act into two different parts, first, those provisions which the Board holds only applicable to *unfair labor practices by employers*, as to which the Board concedes the remedy of judicial review exists, and second, that part of the Act which secures to *employees* their vital right of choosing their representatives for collective bargaining, as to which the Board contends there is no remedy afforded by the Act to protect. This is an anomalous construction of the Act and leaves its administration ineffective with respect to the rights of *employees* in the Board's dealings with them, whilst effective *only* with respect to the rights of *employers* in controversies arising between them and the Board.

B. Apart from the reasons discussed hereinbefore, Section 10 (f) of the Act conferred jurisdiction upon the Court below to review the Board's Order, operating so destructively upon Respondents' cardinal rights under the Act. The construction of said Section contended for by Petitioner, against judicial review, under the Act, of said Order, would unconstitutionally deprive Respondents of their valuable rights, and would make the Act, as applied, violative of the Fifth Amendment. If the words of Section 10 (f) are given their natural meaning the Court below, whose jurisdiction embraces Michigan,

where both Respondents "reside or transact business", clearly had jurisdiction under it because Respondents were persons "aggrieved" by an "Order" of the Board which irretrievably deprived them of valuable rights, and denied "in whole" the relief they sought from the Board. The broad grant of jurisdiction to review contained in Section 10 (f) is neither expressly nor impliedly limited or restricted as Petitioner contends, and it would require an artificial and unnatural interpretation of, and an unwarranted interpolation of words into, the plain language of the Section in order to sustain Petitioner's construction of that Section. If Congress had intended to restrict and exclude jurisdiction, as the Petitioner contends, it would have used appropriate words of limitation upon the comprehensive language of Section 10 (f). Petitioner's contention would leave the Act in the anomalous state of providing remedy under the Act for only unfair labor practices by the employer, and of failing to provide remedy respecting the rights of employees which the Act secures and declares to be of supreme importance to them, even in the event, as here, of violations of the Act upon the Board's own part. The Petitioner's construction of the Act would make it, as applied to the situation in this case, unconstitutional as in violation of the Fifth Amendment. The Board's Order was, under Section 10 (f) of the Act, subject to review by the Court below which had exclusive jurisdiction to review all questions of the jurisdiction of the Board and the regularity of its proceedings, and all questions of constitutional right or statutory authority. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 47.

C. The Decision of the Court below is not, as claimed by Petitioner, in conflict with the decisions of other

Courts of Appeals. Assuming the correctness of all such other decisions, cited by Petitioner, none of them involved or presented circumstances or questions essentially similar to those in this case, which involve an Order by which the Board illegally and finally deprived employees of the right to select, by election, representatives of their own choosing for collective bargaining—the cardinal right given employees by the Act for their own benefit and protection and to effectuate its avowed policy. The decisions, referred to by Petitioner, of other Courts of Appeals involved *certifications* and dealt with attempts on the part of *employers of labor* to obtain judicial review thereof. Those decisions are not relevant to the questions here under consideration. The Petitioner, moreover, in its argument generally, misses and disregards the essential point of the whole matter, namely, the *harmful illegality* of the Order here, which was in *prevention and denial* of the right of an election, as contradistinguished from an Order *providing for* an election, or a certification of facts or findings based upon an election. The *American Federation of Labor* case, involving a *certification* by the Board, is clearly distinguishable from the instant case because, among other reasons, the main contention of the petitioning unions there was as to the designation by the Board of the appropriate unit which the Board is, by Section 9 (b) of the Act, expressly given power to determine. In that case, moreover, the successful union actually embraced a majority of employees eligible to vote in the unit designated as the appropriate one. In the instant case the Board's Order was final, not only in its effect, but in that it was the last Order to be made under the procedure set out in the Act for the determination of representatives for collective bargaining.

D. The Congressional Reports and the statements made on the floor of the Senate, relied on by Petitioner, have no relation to and do not support its construction of the Act against the right of Respondents to judicial review thereunder of the Direction of "Election", but said Reports and Statements show merely a legislative intention to restrict judicial review only as against procrastinating and objectionable tactics of *employers*, and not to orders denying and preventing elections and illegally and finally denying *employees* their vital rights involved therein. Reference to the Reports and statements shows plainly that appeals by *employers of labor*, whose rights could in no wise be affected by *election* orders, were the only ones intended to be restricted.

E. The Board's Second Direction of Election was a final Order which conclusively and irretrievably denied to and deprived Respondents of their personal and property rights to their irreparable injury. The finality of an Order is determinable by its substance, its inherent nature and its effect, and, measured by that rule, the Order in this case was final within the meaning of the Act. The Order was definitive because it was absolute in its terms, and there was no further procedure that could have been taken by Respondents before the Board to alter or vary the Order, and because the rights of Respondents were thereby finally destroyed. Moreover, the Order was entered and issued in a proceeding which was clearly adversary in character. The Petitioner's contention that the Direction of Election was not an Order because it did not require Respondents to take or refrain from taking any action is the same contention that was made by the Board and rejected by this Court in *International Brotherhood of Electrical Workers, et al. v. National Labor Relations Board*, 305 U. S.

197, 232-237. *United States v. Los Angeles etc. R. Co.*, 273 U. S. 299, and similar cases relied upon by Petitioner on this point, are distinguishable because, among other reasons, those cases dealt with the right to review, under the Urgent Deficiencies Act, of orders of the Interstate Commerce Commission whose orders are not reviewable *within the provisions of the Commerce Act*, as orders of the Board here are reviewable under and within the provisions of the National Labor Relations Act. The doctrine of non-reviewability of negative orders of the Commerce Commission has been qualified by this Court to such an extent as to make it no longer applicable to many orders of the Commerce Commission, much less applicable to an Order of the Board under the Act here, which provides a totally different kind of procedure from that under the Commerce Act and Urgent Deficiencies Act. *Rochester Telephone Corp. v. United States*, 307 U. S. 125; *Federal Power Comm. v. Pacific Power & Light Co.*, 307 U. S. 156.

F. The finality of the Second Direction of Election, for purposes of its reviewability under the provisions of the Act, is determinable by its actual operation and effect, and the substantiality of the rights which it abridges or denies. Where the execution or operation of an order will subject persons affected thereby to irreparable injury, it is a final order and is reviewable to that extent, although the proceeding is retained by the lower tribunal for the purpose of the determination of other matters. *Forgay, et al. v. Conrad*, 47 U. S. 201. The Order directing the "election" was a final and reviewable Order because it involved a determination of a substantial right against Respondents in such a manner as to leave them no adequate relief except by the review which they sought.

ARGUMENT.

I.

The so-called "Election" by a Ballot excluding the Brotherhood Local and restricting the Employees to vote only for or against the CIO Union, is not an Election within the meaning of the Act, and of settled General Law, and the Order directing it illegally deprived Respondents and their Members of rights dominantly provided for their benefit and protection by the Act, and for the effectuation of its purposes, and secured against deprivation by the Act and the Fifth Amendment.

The Board's Order *specifically ordered and required the use at the "election" of a secret ballot from which the name of the Respondent, the Brotherhood Local, was to be entirely omitted and excluded,* and upon which *only* the name of the CIO Union was to appear, so that the electors would have to vote solely and exclusively for or against that Union, with no alternative choice. Of the whole number of 2,977 voters in the appropriate unit, *all* who did not wish to vote for the CIO Union, *including all who did wish to vote for the Brotherhood Local,* were reduced and restricted to a *mere veto* of the CIO Union, and were deprived of the essentials of the right of real *election.*

This one-sided, unfair and discriminatory contrivance would have *permitted* some voters to express their choice, and *prohibited* large numbers of other voters *from* expressing their choice. The very large number of those so discriminated against by the prohibition of an expression of choice upon their part is manifested by the fact that at the last preceding election there were 2,977 eligible voters, of whom 1164 voted for the CIO

Union, 1072 for the Brotherhood Local, 506 for Neither, and the balance, 235, cast either no ballots at all or ineffective ballots.

It is apparent that of those voting, more than eighty per cent wanted *some* labor union to represent them. There is obviously a serious restraint and disadvantage imposed upon voters who, if preferring a candidate of their own choice to the sole and only candidate named upon the ballot, are compelled to vote absolutely against such solely-named candidate or not vote at all, and are deprived of the right to exercise the less inimical and less extreme alternative of voting for a candidate of their own choice and thereby express *merely a preference for another, instead of an unqualified and hostile repudiation of the sole candidate upon the ballot.*

As will be seen by reference to the results of the original election conducted by the Board from January 9 to 12, 1939, nearly one-half of the voting employees of the Company, desiring to be represented for the purposes of collective bargaining, expressed a preference for the Brotherhood Local. Indeed, the plurality of the CIO Union over the Brotherhood Local at that election was only slightly over 3% of the total number of employees eligible to vote in the election. The Board's Order, excluding and outlawing all those employees and voters in the appropriate unit who might want to vote for the Brotherhood Local, thus definitely terminated and destroyed the right of the Brotherhood Local to represent its members and other employees of the Company in collective bargaining, and the right of the members of the Brotherhood Local, who constitute a large and substantial portion of the employees of the

Company, as well as other employees, to vote for it as their representative. In these respects the Board's Order completely and finally took away the *personal rights* of Respondents and their members, as well as those rights which this Court, in *Texas and New Orleans Railroad Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548, 571, adjudicated to be *property rights*.

This sort of ballot, which is a *negation* of a free, unrestricted election, substituted a *veto* for an *election*, permitted only one expression of a designation and choice of a representative, and forbade any other expression of a designation or choice, upon the part of the employees or electors in the appropriate unit. It, in every probability, predetermined the result of the balloting. It forbade any election which may have altered that predetermined result and significantly assimilated the whole proceeding to the so-called "election", after he had established beyond resistance his military dominion of France, of Napoleon as Consul for Life of France, by a ballot containing only the words "Shall Napoleon Bonaparte be Consul for Life?", with provision for a vote of *"Oui* or *"Non"*, and excluding any other or alternative expression of choice.

Such ballots are obviously a mockery of every essential and office of an *election*.

In Dr. Francis Lieber's classic, *"Civil Liberty and self-Government"*, at page 392, that distinguished Publicist declares that:

> *"Elections * * * which allow to vote only yes or no, have really little meaning*, as the history of France abundantly proves."

And further discussing the subject, on page 393, he states:

> "The question was not, Shall A or B rule us? Essentially this question would not have been better; but there would have been apparently some sense in it. The question simply was: 'Shall B rule us?—Yes or No.' It is surprising that some persons actually believe reflecting people may thus be duped."

And in his Paper on Elections, Appendix I to the Work above mentioned, page 420, Dr. Lieber also says:

> "Votes of this sort have no meaning for the historian, at least so far as the subject voted on is concerned, and they have a melancholy meaning for the contemporary patriot. There seems to be a Nemesis eagerly watching these votes, and each time proving, by events succeeding shortly after, how hollow they were at the time."

And referring to the term "*election*" as applied to such processes, he states in a foot-note upon page 420:

> "There is no other term in our language, although it is obvious that *these processes cannot be properly called elections. Votings would be more correct.*"

And in the text, at page 421, he also states:

> "The indecency as well as the absurdity and immorality of government recommending what is to be voted ought never to be permitted. * * * *There must be really two things to choose between.* If this is not the case, the whole procedure amounts to no more than what we familiarly call 'Hobson's choice' on a gigantic scale."

In the First Annual Report of the National Labor Relations Board, for the Fiscal Year ended June 30, 1936, referring to the National Labor Relations Act and par-

ticularly its "Policy and Provisions", at page 9, the Board declares that "The Act, in its substantive and procedural provisions * * * makes *no departure from traditional principles of substantive law or statutory administration*". And referring to the rights of employees guaranteed by Section 7, to self-organization and to bargain collectively through *representatives of their own choosing*, etc., and to the provisions of Section 9, relating to representatives and elections, it is further said by the Board:

> "4. Representatives and Elections. Since collective bargaining is carried on through *representatives* of employees, *the act follows established precedents for the factual determination of such representatives.* Section 9 (a) provides that *representatives selected by the majority of employees in a unit appropriate for collective bargaining* shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining. *The act thus affirms the majority-rule principle, which is inherent in the practice of collective bargaining as in the practice of dealing through representatives generally, whether for governmental, corporate or other purposes.*
>
> "Section 9 (b) authorizes the Board to determine in the appropriate case whether, *in order to secure to employees the full benefit of their right to self organization and collective bargaining, and otherwise to effectuate the policies of the act,* the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.
>
> "In order to resolve in an orderly way doubts as to the representatives of employees, the Board is specifically empowered to investigate questions concerning the representation of employees, *to conduct*

elections in appropriate cases, and to *certify* to the parties the *name or names of the representatives that have been designated* (Sec. 9 (c))."

And see also particularly Sections 1, 7 and 9 of the Act itself for its strong declarations on this subject.

It is submitted that the Act in conferring upon and vesting in employees in the appropriate unit the right to elect, and, in the exercise of such right of election, to choose, select and designate by a secret ballot of such employees, and by a majority of them, the exclusive representation of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment, and in expressly providing that the Board shall *"insure to employees the full benefit of their right to collective bargaining"*, and in declaring it to be the policy of the United States, for the purposes of said Act, to encourage the practice and procedure of collective bargaining "by protecting the exercise by workers of *full freedom of * * * designation of representatives of their own choosing*, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection", and in again emphatically enacting in Section 7, that employees *"shall have the right * * * to bargain collectively through representatives of their own choosing* for the purpose of collective bargaining or other mutual aid or protection", intended as one of the principal, if not the principal, means of securing to employees the benefits, protection, security and relief designed by the Act in their behalf and in the general public interest, *that said employees should have free, full and unrestricted elective franchise, or suffrage, to be exercised by ballot, in the choice, selection and desig-*

nation by them of their representatives for collective bargaining. Moreover, it is clear that such elective franchise or suffrage, in its nature, scope and essentials, and particularly in its fullness, freedom and unrestrictedness, and, in its relation to the majority-rule principle, is *analogous to the elective franchise or right of* suffrage, as declared by the Report of the Board hereinbefore quoted, for *"governmental, corporate or other purposes"*, and, with respect to which, as the Board's Report also states, "the Act, both in *its substantive and procedural provisions * * * makes no departure from traditional principles of substantive law or statutory administration."*

It is thus plain that a predominant purpose of the Act, for the effectuation of its express policies, was *to insure, beyond denial or abridgement, upon the part of either employers or the Board itself, full, free and untrammeled action upon the part of said employees in the choice or election of their representatives for the supreme and vital purposes of collective bargaining,* and that such right of employees, under and by virtue of the Act, and the principles of law applicable to the same, for the selection and designation of their own representation in matters of rates of pay, hours of labor, working conditions and other material interests, is a valuable property right and a valuable personal right, the impairment or deprivation of which would result in irreparable damage and injury to employees and, in the instant case, to Respondents.

The elective franchise and right of suffrage vested in employees for the choice and election of representation for collective bargaining were and are not a mere and

restricted franchise and right to vote *for or against some one single candidate*, whether an individual or organization, for collective bargaining representative, but, on the contrary, consisted and consist of the *free exercise of a full, unabridged right of active and positive choice* of such representative as each elector may or might desire to vote for as representative to fill said highly important office, as contradistinguished from *a bare limited veto against, or expression of opposition to, a single designated candidate presented and appearing solely and alone upon the ballot.* In other words, the right of election conferred and guaranteed by the Act is the free and full exercise by the electors of an *affirmative selection and designation* of representatives *"of their own choosing"*. The plain, established meaning and import of the terms employed in the Act in this connection, namely, "choose", "select", "designate", "election", "ballot", "of their own choosing", "selected by the majority", "the full benefit of their right to collective bargaining", all consistently and uniformly lead to the one conclusion that the right of election so conferred was a right of affirmatively choosing by vote a person or organization to fill and exercise the office of representative for collective bargaining, and that when the voter or elector, as in this case, *is deprived, in whole or in part, of his full right of exercising his own choice, selection and designation of the representative in* question, he loses his elective franchise as the same is intended to be vouchsafed to him by the Act.

The *result and effect* of the Board's Second Direction of Election complained of is that Respondents have been *finally defeated and outlawed* at a previous election by the votes of far less than a majority of employees eligi-

ble to vote in the election. To be precise and accurate, the rights of Respondents have been ultimately terminated and precluded, under the mandate of the Board's Decision and Direction, by the votes, in the preceding election, of less than a majority of those voting; and, conversely, the CIO Union has won the prevailing and exclusive right to appear as sole candidate by having polled less than a majority of the votes actually cast. The plurality of the CIO union over the Brotherhood Local was but 92 votes, or only slightly more than three per cent of the total number of employees eligible to vote. Even if the votes of those eligible to vote, but not voting, be added to the total received by the CIO Union, its grand total would still fall far short of the majority required under the democratic principle of majority-rule.

This principle of majority, as against minority, rule, as maintained in the Act, has been recognized by the Board not only in the above quoted excerpts from its First Annual Report, but also in other expressions in said Report. At page 108 of said Report, the Board said:

> "In the cases decided under Section 9 (c) where the Board has certified without holding an election, *it has required proof that a majority of those eligible had designated the organization which was certified.*
>
> "In all cases decided prior to July 1, 1936, where certification was made after *an election* was held, the certification was made on the basis that *a majority of those eligible*, in the unit found appropriate, *had designated* the organization certified, and that such organization, pursuant to the provisions of section 9 (a) of the act, was the exclusive representative of all employees in such unit for the purposes of collective bargaining."

That the Board would not afford recognition to an organization representing less than a majority of those eligible employees voting is likewise plain from its own decision in *Matter of Associated Press*, 1 N. L. R. B. 686. The Board there cited and relied upon *Virginian Railway Co. v. System Federation No. 40*, 84 F. (2) 641, subsequently affirmed by this Court (300 U. S. 515) which, alluding to the majority-rule principle embodied in Section 2, fourth, of the Railway Labor Act, which Section had been by the Board analogized to the parallel Section in the National Labor Relations Act, said, speaking through Mr. Justice STONE (p. 560):

> "It is to be noted that the words of the section confer the right of determination upon a majority of those eligible to vote, but is silent as to the manner in which that right shall be exercised. Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election. *Carroll County v. Smith*, 111 U. S. 556; *Douglass v. Pike County*, 101 U. S. 677; *Louisville & Nashville R. Co. v. County Court of Davidson County*, 1 Sneed (Tenn.), 637; *Montgomery County Fiscal Court v. Trimble*, 104 Ky. 629, 47 S. W. 773. Those who do not participate 'are presumed to assent to the expressed will of the majority of those voting'. *Cass County v. Johnston*, 95 U. S. 360, 369; and see *Carroll County v. Smith, supra*."

The Petitioner urges upon this Court that the effect of these Respondents' contentions, and the apparent requirement of the Decision of the Court below, is to dictate and compel a form of ballot "containing the names of both unions, and with no place for a neither vote," thus necessitating the victory of one or the other of

the two competing Unions, and precluding employees from expressing their choice for neither Union or for no union at all. (See Petitioner's Brief herein, pp. 12-13.) This is obviously an entirely erroneous conception of the Respondents' position, and a totally unjustified interpretation of the Decision of the Court below, as a mere reading of its Opinion reveals. The Decision of the learned Court below and the contention of the Respondents herein assert *only* that the ballot required to be used, under the Direction of Election, would have been a radically unfair and discriminatory contrivance, not a legal ballot, or election, at all, and would have prohibited and proscribed large numbers of the employees from their right of expressing their free choice. *Indeed, the ballot which the Petitioner erroneously assumes it is now required to employ, and which the Petitioner so vigorously condemns and declares would be an improper and irregular ballot, is precisely of the same kind it directed to be used at the so-called run-off election,* and which was condemned by the Court below, because such a ballot would prevent the free and untrammeled choice and election on the part of the employees, guaranteed to them by the Act.

It is thus clearly seen that what was actually done by the Board's Supplemental Decision and Second Direction of Election, in contravention of the majority-rule principle inherent in the Act, as the Board itself has construed it, was to allow on the ballot to be used at the "election" the name of *only* a labor organization which was definitely in the minority in the original election of January, 1939, and to exclude and omit the Respondent, the Brotherhood Local, which was in precisely the same minority class as the CIO

Union as the result of said original election, thus denying to said Respondent, and depriving it and its members of, their rights of *election* under the Act.

Definition of an Election and Its Essentials.

In the Standard Law and General Dictionaries and in numerous Judicial Decisions, the following definitions are given:

Black's Law Dict. (2nd ed.), p. 415: "Election. The act of choosing or selecting one or more *from a greater number* of persons, things, courses or rights. * * * "The selection of one man *from among several candidates to* discharge certain duties in a state, corporation, or society. *Maynard v. District Canvassers*, 84 Mich. 228, 47 N. W. 756; *Brown v. Phillips*, 71 Wis. 239, 36 N. W. 242; *Wickersham v. Brittan*, 93 Cal. 34, 28 Pac. 792."

The Encyclopedia Britannica, 11th edition, vol. IX, title Election, page 169: In "the legal sense it is confined to the selection by the preponderating vote of some properly constituted body of electors of one *of two or more candidates*, sometimes for admission only to some private social position (as in a club), but more particularly in connection with public representative positions in political government."

And to the same effect:

Bouvier's Law Dictionary (1926 ed.): "Election."

20 Corpus Juris, Elections, p. 55.

Webster's Twentieth Century Dictionary, p. 541: "Election."

Worcester's Dictionary of the English Language (1888), p. 409: "Election."

The New Century Dictionary (1927): "Election."

State v. Hays, 91 Miss. 755, 45 So. 728, (citing *Foster v. Scarff*, 15 Ohio 532).

Brown v. Phillips, 71 Wis. 239, 36 N. W. 242 ("the act of selecting one or more from others").

Hudgins v. State, ex rel. A. T. Hicks & Co., 145 Ala. 499; 39 So. 717 ("the act of electing one or more from others").

State v. Cahill, 131 Iowa 155; 105 N. W. 691 ("the choice or selection of *one man amongst more* to fill a certain office").

Maynard v. Board of Dist. Canvassers, 84 Mich. 228; 47 N. W. 756.

Bowler v. Eisenhood, 1 S. D. 577; 48 N. W. 136 ("*the selection of one man from amongst more* to discharge the duties in a state, corporation, or society").

Wickersham v. Brittan, 93 Cal. 34; 28 Pac. 792.

State v. Hirsch, 125 Ind. 207; 24 N. E. 1062.

People v. Board of County Canvassers of Onondaga County, 129 N. Y. 395, 29 N. E. 327.

People v. Crissey, 91 N. Y. 616, 634-635 (the Court declared that the person voted for was not elected, saying "*an election implies opportunity to re-elect or choose another, and such was not given. It is a misnomer to call such a proceeding an election*").

An Election to be legal and valid must be free, fair and untrammeled; must be impartial, equal and undiscriminating with respect to the electors and their rights, and must not deny, abridge or impede the full exercise and enjoyment of their suffrage.

In *Cooley's Constitutional Limitations* (8th ed.), at page 1370, *et seq.*, it is said:

> "All regulations of the elective franchise, however, must be reasonable, uniform and impartial; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, they must be declared void. * * *
>
> "The mode of voting in this country, at all general elections, is almost universally by *ballot*. * * * The system of ballot voting rests upon the idea that *every* elector is to be *entirely at liberty* to vote *for* whom he pleases and with what party he pleases, and that no one is to have the right, or be in position, to question his independent action, either then or at any subsequent time.

In *People v. McCormick*, 261 Ill. 413, 103 N. E. 1053, Ann. Cas. 1915 A, 338, the Court said:

> "Since the constitution has declared that all elections shall be free, each elector is *entitled* to cast his vote *for* any eligible person for any office provided by the Constitution *free from any restraint* not authorized by the Constitution itself. The legislature may determine the manner of conducting elections and the means of ascertaining and declaring the result, *but it has no right to interfere with the freedom of choice, which is the meaning of freedom of election. It is essential to the freedom of elections mentioned in the Constitution that every voter shall be permitted to choose from all eligible persons and shall not be required to choose from certain classes.*"

In the leading case of *State v. Dillon*, 32 Fla. 545, 14 So. 383, 22 L. R. A. 124, it was held that "in requiring an official ballot, the voter cannot be restricted to the candidates whose names are printed. He must be allowed to vote for whom he pleases."

And see the exhaustively considered case of:

Jackson v. Norris, 173 Md. 519, 195 Atl. 576, and cases cited.

And also:

20 Corpus Juris, Elections, pp. 62 and 140.
10 Amer. and Eng. Enc. of Law, p. 576.
Page v. Allen, 58 Pa. St. 338.
Atty. Gen. v. Detroit, 78 Mich. 545.

The settled and familiar Principles declared in the foregoing Authorities have been expressly applied to the Elections of Representatives secured to Employees in the Federal Labor Acts.

In *Virginian Railway Company v. System Federation No. 40*, 84 F. (2) 641 (C. C. A. 4), affirmed by this Court in 300 U. S. 515, it is said, in the Opinion of the Circuit Court of Appeals:

> "One purpose of the Railway Labor Act, as amended, was to assure *free and untrammeled* action on the part of the employees in the *choice of their representatives* for the purpose of *collective bargaining*.
>
> "The *right* of self-organization and *representation* in the matter of rates of pay, hours of labor, and working conditions is a *property right*, the loss of which would result in irreparable damage to complainants. *Texas and N. O. R. Co. v. Brotherhood of Ry. and S. S. Clerks*, 281 U. S. 548.
>
> "It (the Act) merely prescribes the political principle of majority rule. Another section of the Act provides the means of determining the majority, *the political device of the secret election.* * * * *The universal rule as to elections of officers and representatives is that a majority of the votes cast elects*, and that those not voting are presumed to acquiesce in the choice of the majority who do vote. * * *

Such a rule is fair and just to all parties. *It gives every employee an opportunity to express his choice.*"

In *National Labor Relations Board v. A. S. Abell Co.*, 97 F. (2) 951 (C. C. A. 4), the Court said:

"The *choice* between Union and Committee was presented to the men; *its free exercise was guaranteed* in the 'right to self-organization' and '*to bargain collectively through representatives of their own choosing*' conferred by Section 7 of the Act, 29 U. S. C. A. sec. 157".

II.

The Board's Second Direction of Election, denying, rather than providing for, a Legal and Valid Election by the Employees of the Company, and operating definitively and destructively upon Respondents' rights secured to them by the Act, is a final Order, judicially reviewable as such under Section 10 (f) of the Act.

A.

As the Act, itself, fully demonstrates that the Employees' right of collective bargaining, through representatives of their own choosing, is the Act's principal and predominant purpose and means of effectuating it, and that the prevention of the proscribed unfair labor practices is integrally connected with and essentially ancillary to said principal and predominant purpose, it follows that the broad provisions for judicial review, under Section 10 (f) of the Act, properly and necessarily include jurisdiction and control by such review of orders of the Board destroying said major right of employees to collective bargaining in violation of said purpose and effectuation of the Act.

The avowed Policy and Purpose of the Act, its Provisions and their correlation, and the settled Canons of

Statutory Construction, it is respectfully submitted, fully sustain the interpretation of the Act stated above.

The National Labor Relations Act in all its parts and provisions, the public statement of President Roosevelt when he signed the Act, the reports and declarations of the Board, and the decisions of this Court, demonstrate the integral connection and relationship between the provisions of the Act securing to employees collective bargaining through representatives of their own choosing, as the Act's predominant purpose and effectuating means, and the prevention of impediments to that purpose consisting of the unfair labor practices which the Act proscribes, the prevention of which is ancillary to the Act's said principal purpose of maintaining an unprejudiced right to collective bargaining, and indicate the unity and indivisibility of the Act in its policy, intent, substance and remedial provisions, and establish, beyond doubt, that in the repression of the unfair practices, which it denounces, the protection and security of collective bargaining are, directly or indirectly, intended; or *e converso*, the maintenance of the Act's cardinal objective and remedy of collective bargaining involves and requires the prevention of the denounced unfair labor practices. In other words, the policy, intent, substance and structure of the Act, and the plainly designed coherence and adaptation of all its provisions to the supreme and general object and remedy which it repeatedly avows, show that the broad remedial jurisdiction vested by the Act in the Circuit Courts of Appeals, by judicial review, to confine the Board's orders within the Act and the fundamental law, properly and necessarily includes jurisdiction and control, by such review, of the Orders of the Board, not only with reference to the prohibited un-

fair labor practices, *but also with reference to the major and supreme right of the employees to collective bargaining through independent representatives* of their own free choosing. Any other construction would be protecting by judicial review and control the incidental and auxiliary right of the employee as against the employer, whilst abandoning and leaving wholly unprotected, and without judicial protection and redress under the Act, the principal and vital right of the employee (the very right to which the suppression of the unfair labor practices is incidental and auxiliary) as against the Board itself.

The *President of the United States*, on approving the Act (see footnote, p. 9, of the Board's First Annual Report), made the following statement:

> *"The Act defines, as part of our substantive law, the right of self-organization of employees in industry for the purpose of collective bargaining, and provides methods by which the Government can safeguard that legal right.* It establishes a National Labor Relations Board to hear and determine cases in which it is charged that *this legal right is abridged or denied*, and to *hold fair elections to ascertain who are the chosen representatives of employees.*
>
> *"A better relationship between labor and management is the high purpose of this act. By assuring the employees the right of collective bargaining, it fosters the development of the employment contract on a sound and equitable basis.* By providing an *orderly procedure* for determining who is entitled to represent the employees, it aims to remove one of the chief causes of wasteful economic strife. *By preventing practices which tend to destroy the independence of labor, it seeks, for every worker within its scope, that freedom of choice and action which is justly his."*

In its said Report, the Board itself, referring to the "Policy and Provisions" of the Act, declares:

> "The Act, both in *its substantive and procedural provisions, remedies the defects disclosed by experience under previous statutes, and at the same time makes no departure from traditional principles of substantive law or statutory administration.*
>
> "1. *Findings and policy.*—Section 1 of the act, after setting forth the *effect of unfair labor practices and labor disputes* upon the free flow of interstate commerce, *concludes in these terms, which summarize the theory underlying the entire statute:*
>
> "Experience has proved that *protection by law* of the *right of employees to* organize and *bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.*
>
> "It is hereby *declared to be the policy of the United States to eliminate the causes* of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by *encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.*"

The Board then, in its said Report, refers to its own status and functions under the Act as follows:

"2. The Board.—*For the effectuation of this policy*, the Act sets up a nonpartisan, quasi-judicial board of three members appointed by the President."

And the Board further declares:

"The Board is authorized to make and publish *such rules and regulations as may be necessary to carry out the provisions of the Act.*"

The Board's said Report next proceeds to set forth and discuss the "Rights of Employees" as follows:

"3. *Rights of employees.—Section 7 reaffirms* long recognized *fundamental rights* enjoyed by *American workers*, as follows:

"*Employees shall have* the *right* to self-organization, to form, join or *assist labor organizations, to bargain collectively through representatives of their own choosing*, and to engage in concerted activities, *for the purpose of collective bargaining* or other mutual aid or protection.

"SECTION 8 IMPLEMENTS THESE RIGHTS BY ENUMERATIING AND PROHIBITING CERTAIN SPECIFIC UNFAIR LABOR PRACTICES BY EMPLOYERS. *These may be briefly summarized as follows:*

"(1) *To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.*

"(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.

"(3) By discrimination in regard to *hire* or *tenure of employment or any term or condition of employment*, to encourage or discourage membership in any labor organization.

"(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the act.

"(5) *To refuse to bargain collectively with the duly chosen representatives of employees.*

*"To subsection 3 there is added a proviso that nothing in the act shall make illegal a closed-shop agreement between an employer and the duly chosen representatives of his employees. * * * No closed shop can be established without the consent of the employer himself in negotiation with the representatives of his employees."*

The precise provision of Section 8 (3) upon this subject is particularly noteworthy with reference to the special subject matter under present consideration. The proviso of the Section is that nothing in the Act, or in the National Industrial Recovery Act, etc. shall preclude an employer from making an agreement with a labor organization (*not established, maintained, or assisted by any action defined in this Act as an unfair labor practice*) to require as a condition of employment membership therein, *if such labor organization is the representative of the employees as provided in Section 9 (a) in the appropriate collective bargaining unit covered by such agreement when made.* It will be noted that *two conditions* are *here closely grouped together as the bases upon which closed shop agreements between the employer and the employees are authorized, namely, that the agreement be by a labor organization which is the representative of the employees in the appropriate collective bargaining unit, elected under Section 9 of the Act; and, second, that such labor organization be not established, maintained or assisted by an unfair labor*

practice. Thus, even unto the detail of authorizing a closed shop agreement, the Act closely connects the representative chosen under Section 9 as the collective bargaining representative of the employees with the prohibition of unfair labor practices interfering with the rights and the independence of the employees, which collective bargaining is provided, by the Act, to protect and secure.

The Board's Report next takes up the subject of *Representatives and Elections*, upon which it states:

"4. *Representatives and elections.*—Since *collective bargaining* is carried on *through representatives of employees*, the act follows *established precedents for the factual determination of such representatives. Section 9 (a) provides that representatives selected by the majority of employees in a unit appropriate for collective bargaining shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. The act thus affirms the majority-rule principle, which is inherent in the practice of collective bargaining as in the practice of dealing through representatives generally, whether for governmental, corporate, or other purposes.*

"Section 9 (b) authorizes the Board to determine in the appropriate case whether, in order *to insure to employees the full benefit of their right to self-organization and collective bargaining, and otherwise to effectuate the policies of the act*, the unit *appropriate for the purposes of collective bargaining* shall be the employer unit, craft unit, plant unit, or subdivision thereof.

"In order to resolve in an orderly way doubts as to the *representatives of employees*, the Board is specifically empowered to investigate questions concerning the representation of employees, *to conduct*

elections in appropriate cases, and to certify to the parties the name or names of the *representatives that have been designated* (sec. 9 (c))."

In full and exact accord with the declaration of President Roosevelt in giving his approval to the Act, and with the declarations of the Board itself, above quoted, are the manifest Intent of the Statute and the uniform contributing purposes of its several Sections.

Every provision of the Act testifies unmistakably that *collective bargaining* by the employees, through representatives of their own choosing, with the employers, upon the vital subjects of wages, hours, and all other material conditions of employment, *is the prevention of and remedy for the evils and mischiefs which the Act was passed to suppress, including the prevention of and remedy for all forms of unfair labor practices which it proscribes.* Instead of, as the Board contends, *separating* collective bargaining by the employees through independent representatives of their own choosing from prohibited unfair labor practices, whereby the Act would be divided into two different and independent subject-matters with respect to its policy, substance and remedies, and with respect to the status and functions of the Board under it, the Act *integrates inseparably the two subjects*, the provision and security of collective bargaining being the *principal* subject-matter, and the prevention of unfair labor practices, as adversely interfering with collective bargaining and the accomplishment of its avowed objects, being the *incidental* subject matter. Construed according to Lord Coke's leading and familiar canon of statutory construction, that is, *to suppress the mischief and advance the remedy*, the

Act, in all its closely connected and coherent statements of the evils to be overcome, its declarations of policy, the general and paramount remedy it provides, its ancillary and particular prohibitions to accomplish its general and principal purpose, its manifest intent that all its provisions, both affirmative and prohibitory, are deliberately correlated and designed to *effectuate* its policies by protecting the employees in the rights granted to them and prohibiting and preventing evils which destroy or threaten those rights, reveals its interrelated, integral and indivisible nature in its substantive, procedural and remedial features.

In brief, the Act itself declares and demonstrates the close causal and remedial connection between collective bargaining by freely chosen representatives and the prevention of unfair labor practices, actually setting up such collective bargaining as the main means of preventing, and itself the potential prevention of, unfair labor practices denounced by the Act.

In full harmony, as above stated, with the elucidating declarations, above quoted, of the President and of the Board, are the title, the preambles or keynotes of Section 1, as well as the express literal enactments of Section 2, Section 7, Section 8, Section 9 and Section 10 of the Act, to which especial attention of the Court is here respectfully asked.

After declaring in its Title the object of the Act "*To diminish the causes of labor disputes* burdening interstate, etc. commerce," Section 1, under the caption "*Findings and Policy*", provides:

> "*The denial by employers of the right of employees to organize and the refusal by employers to ac-*

cept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processsed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) *causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing* from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association, substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, *by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.*

"Experience has proved that *protection by law* of the *right of employees* to organize and *bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.*

"It is hereby declared to be the policy of the United States to eliminate the causes of certain sub-

stantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by encouraging the practice and procedure of collective bargaining* and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Section 2 of the Act, captioned "Definitions," provides:

"(1) The term '*person*' includes *one or more individuals*, partnerships, *associations*, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

"(4) The term '*representatives*' includes any individual or labor organization.

"(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and *which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.*

* * *

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce, or the free flow of commerce, or having *led or tending to lead to a labor dispute* burdening or obstructing commerce or the free flow of commerce.

"(8) The term 'unfair labor practice' means any unfair labor practice *listed in section 8.*" (*These having expressly to do with the employees' rights of collective bargaining through representatives of their own choosing.*)

"(9) The term '*labor dispute*' includes *any controversy concerning terms, tenure or conditions of*

employment, or concerning the association or *representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless* of whether *the disputants* stand in the *proximate relation of employer and employee.*"

Section 7 of the Act, captioned "Rights of Employees", provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, *to bargain collectively through representatives of their own choosing*, and to engage in concerted activities, *for the purpose of collective bargaining* or other mutual aid or protection."

Section 8 shows that the main and principal unfair labor practice prescribed and put down by the Act is any interference with the employees in the exercise of their right to bargain collectively through representatives of their own choosing or to organize in concerted activities for the purpose of collective bargaining.

Nothing could more expressly or completely demonstrate that the employees' right to bargain collectively through representatives of their own choosing for the purposes of collective bargaining is the dominant purpose of the Act, and that the unfair labor practice, consisting of any interference by the employer with the exercise of such right, the security of which is the "high purpose" (*per* President Roosevelt) of the Act, is prohibited by Section 8 (1) as auxiliary to the preservation and security of the right. It is perfectly plain, therefore, that *the prevention* of unfair labor practices, involving, directly or indirectly, interference with the right of employees to bargain collectively through rep-

resentatives of their own choosing, is basically and broadly intended for the protection and security of the employees in the free and full exercise of that right.

Section 8 (2), prohibiting the employer from interfering with the formation or *administration* of any labor organization, has also a perfectly apparent relation to the right of employees to bargain collectively through representatives of their own choosing for the purpose of collective bargaining, although not as close and direct as the relation of 8 (1) thereto.

Section 8 (3), in several respects, also has a plain and close relationship to the right of employees to bargain collectively, declared in Section 7, inasmuch as "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization" would undeniably be an interference with employees' rights of collective bargaining through representatives freely chosen, guaranteed by Section 7. And the other respects in which Section 8 (3) is related to collective bargaining, secured by Section 7, with regard to closed shop agreements, and with relation to Section 9 (a), have hereinabove been pointed out. Section 8 (5) has in express terms to do directly with collective bargaining with the representatives of the employees, subject to the provisions of Section 9 (a).

Under the caption, and dealing with the subject, of "Representatives and Elections", Section 9 (a), (b), (c) and (d) shows the integral connection between representatives and elections and unfair labor practices, demonstrating the uniform, pervading thesis of the Act to outlaw and repress various unfair practices as conflicting

and interfering with the supreme right of the employees to designate and select for the purpose of collective bargaining representatives of their own choosing, and to "insure to employees the full benefit of their right" to collective bargaining and to effectuate the policies of the Act, and to take a secret ballot of the employees whereby they may designate and select their representatives for that purpose, and to secure a review, upon the entire record required to be filed under Sections 10 (f) and 9 (d), of an order of the Board aggrieving them and praying the Court to modify or set aside such order in whole or in part.

It is respectfully submitted that the aforegoing discussion cogently demonstrates that the *remedial and corrective jurisdiction* conferred by *Section 10* of the Act upon Courts of Appeals to review, and to enforce, modify or set aside, the orders of the Board is, by the supreme policy and the cardinal purpose of the Act, and the interrelation of all its provisions for the effectuation of its policy and purpose, fully commensurate with, and broadly covers and includes, *everything which the Act requires or prohibits for the effectuation of its policies and purposes*, and that, accordingly, the remedies, pursuant to review, which Section 10 authorizes and directs the said Courts to apply, are not limited and technical, but embrace the complete and harmonious enforcement of the whole Act, together with the fundamental law of the land, including every order of the Board, which finally affects employers, employees, organizations, individuals, or "persons", whose rights under or with respect to the Act are, in violation of it or the organic law, denied or impaired.

As "unfair labor practices" are denounced and prevented by the Act manifestly and undeniably for the purpose of protecting and securing the employees' right to bargain collectively through representatives freely chosen, in elections specially provided for that purpose, and as the objects of such collective bargaining are to protect the employees in their vital concerns of wages, hours of work, and all other conditions of employment, to which objects, and the interests of the employees therein, the prohibited unfair labor practices have direct and essential relation, it would be not only a violation of every sound precept of statutory construction, but, with great deference it is submitted, of plain, irresistible common sense, to confine and restrict the jurisdiction of the Courts of Appeals, and the judicial remedies which that jurisdiction is conferred to provide, to merely the *subordinate and incidental* subject-matters of the Act, and utterly exclude from the whole sphere of such judicial remedy the *paramount and predominant rights* which it is the main purpose of the Act to vouchsafe to the employees, and, for the inviolate maintenance of which against denial or interference, the repression of unfair labor practices is commanded.

The immemorial canons of stautory construction conclusively sustain the construction and application of the Act here respectfully maintained, on behalf of Respondents, to be true, sound, legal and just. There is no more firmly settled or familiar canon of statutory construction than that the intent of the statute is to be ascertained from the whole statute, and that, when so ascertained, the intent is the statute, and will be read, wherever possible, harmoniously throughout the Act into all of its provisions.

In *Potter's Dwarris*, p. 188-189 (see also p. 184), it is said:

> "It is the most natural and genuine exposition of a statute, to construe one part by another part of the same statute, for that best expresses the meaning of the makers; and such construction is *ex visceribus actus.*"

In 2 *Lewis' Sutherland, Statutory Construction*, 2nd edition, Sec. 344, pages 659-660, it is said:

> "It is to be presumed that all the subsidiary provisions of an act harmonize with each other, and with the purpose of the law; if the act is intended to embrace several objects, that they do not conflict. Therefore it is an elementary rule of construction that all the parts of an act relating to the same subject should be considered together, and not each by itself. *By such a reading and consideration of a statute its object or general intent is sought for, and the consistent auxiliary effect of each individual part.* Flexible language which may be used in a restricted or extensive sense will be construed to make it consistent with the purpose of the act and the intended modes of its operation as indicated by such general intent, survey and comparison—*ex antecedentibus et consequentibus fit optima interpretatio.*"

In Section 368, it is said (p. 706-707):

> "A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently each part or section should be construed in connection with every other part or section and so as to produce a harmonious whole. It is not proper to confine the attention to the one section to be construed."

See also:

Sections 348, 363-4, 369, 380, 444.
Endlich on the Interpretation of Statutes, Sections 27, 29, 103, 295 and 339.
59 *Corpus Juris*, Statutes, pp. 961 and 993.

As shown above, the construction of the Act contended for by the Board arbitrarily *divides* the Act itself into *two* entirely separate and radically different parts —one, those provisions of the Act which the Board, in its unaccountably narrow view of the Act itself, holds only applicable to *unfair labor practices by employers*, as to which the Board concedes the right and remedy of judicial review exist; and two, separate and different from the first, that part of the Act which secures to *employees* their vital and paramount rights of choosing representatives for collective bargaining, as to which the Board contends there is no remedy and no relief afforded by the Act to protect, secure and enforce such cardinal rights of the employees, which the contention of the Board most strangely and repulsively maintains are entirely subject to the discretionary, arbitrary, ultimate and irreviewable determination and fiat of the Board alone. This is not only at war with every conception of American law, and not only an anomalous construction of the Act, but would emasculate the Act to a semi-abortive state, leaving its administration unfair and ineffective with respect to the rights of the *employees* in the Board's dealings with *them*, whilst effective only with respect to the rights of *employers* and the *powers* of *the Board* in controversies arising *between them*. An appropriate characterization of the Board's position in this respect is found in the language of Mr. Chief Justice WHITE in *Pennington v. United*

States, 231 U. S. 631, who said, in rejecting a construction sought to be placed upon a federal statute:

> "In other words, the only avenue of approach for the proposition is through a gateway created by *wrenching the provision asunder.* We are of opinion that this may not be done. * * * things may not be so associated as one for the purpose of securing the enactment of legislation upon the theory that they are one, and when enacted be disassociated for the purpose of judicial construction so as to cause them to be wholly independent of one another."

And it is, of course, a firmly established canon of construction that the *intention* of the law-maker is to be deduced from the *whole statute and every material part* of the same. *United States v. Fisher*, 2 Cranch 358; *United States, ex rel. Parrish, v. MacVeagh*, 214 U. S. 124; *Great Northern R. Co. v. United States*, 208 U. S. 452; *Home Sav. Bank v. Des Moines*, 205 U. S. 503; *Blair v. Chicago*, 201 U. S. 400; *Lockwood v. Exchange Bank*, 190 U. S. 294; *Earle v. Carson*, 188 U. S. 42.

See also, for other expressions and applications of the principles of construction above stated

Postmaster General v. Early, 12 Wheat. 136
Wood v. United States, 16 Pet. 342
Peck v. Jenness, 7 How. 612
Brown v. Duchesne, 19 How. 183
Heydenfeldt v. Daney Gold, etc. Co., 93 U. S. 634
Red Bird v. United States, 203 U. S. 706
Ross v. McIntyre, 140 U. S. 453
Fasulo v. United States, 272 U. S. 620
Talbott v. Silver Bow County, 139 U. S. 438.

B.

Apart from the reasons discussed hereinbefore, Section 10 (f) of the Act conferred jurisdiction upon the Court below to review the Board's Order, operating so destructively upon Respondents' cardinal rights under the Act. The construction of said Section, contended for by Petitioner, against judicial review, under the Act, of said Order, would unconstitutionally deprive Respondents of their valuable rights, and would make the Act, so applied, violative of the Fifth Amendment.

As the Board's Order illegally and finally deprived the Respondents of basic rights given them by the Act for their benefit and for the effectuation of the policy of the Act, it is respectfully contended that said Order was, under the plain terms of Section 10 (f) of the Act, which confers exclusive and comprehensive appellate jurisdiction upon Courts of Appeals, properly reviewable by the Court below. If the words of that Section are given their natural meaning it would seem beyond question that the Court below clearly had jurisdiction under it, because Respondents were persons "aggrieved" by an "Order" of the Board which irretrievably denied to and deprived them of valuable personal and property rights, and denied "in whole" the relief they sought from the Board in their letter and Petition of February 11 (R. 12) to it and in their oral argument before it on February 24, 1939. And, inasmuch as the Sixth Circuit, throughout which the jurisdiction of the Court below extends, embraces Michigan, where both Respondents "reside or transact business", the Court below plainly had jurisdiction as provided by Section 10 (f).

Petitioner contends that the Act, Section 10 (f), confers jurisdiction upon Courts of Appeals to review *only*

cease and desist orders *against employers* made in unfair labor practice cases. One obvious answer to that contention is that there is no express language in Section 10 (f) limiting or restricting the broad grant of jurisdiction to review contained therein to only such orders as Petitioner contends are reviewable, and it would require an artificial and strained interpretation of, and an unwarranted interpolation of words into, the plain language of the Section to transmute the words "*a final order of the Board granting or denying*" etc., into the words "*a final cease and desist order of the Board against an employer in an unfair labor practice case granting or denying*" etc. If Congress had intended to limit and restrict the jurisdiction of the Courts of Appeals to the review of only a cease and desist order against an employer in an unfair labor practice case, it would have used appropriate words of limitation and restriction to that effect upon the comprehensive language of Section 10 (f). As the Court below, in denying the Board's contention on this point, so cogently stated (R. 47):

> "Finally, it is said (by the Board) that the phrase 'Wherein the unfair labor practice in question was alleged to have been engaged in' found in Sec. 10 (f), limits the right of judicial review to procedure involving unfair labor practices only, as described in Sec. 10 of the Act. It certainly permits a review of the procedure in such character of controversy *but does not confine it thereto.*
>
> "The Supreme Court did not so limit it in *Edison Co. v. Labor Board*, 305 U. S. 197, 226. See also the discussion touching jurisdiction under Sec. 10 (f) found in *In re Labor Board*, 304 U. S. 486, 493; and in *Ford Motor Co. v. Labor Board*, 305 U. S. 364, 369."

In *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, this Court, through Mr. Chief Justice HUGHES, in construing Section 10 (f) of the Act said (p. 369):

> "While Section 10 (f) assures to *any aggrieved person* opportunity to contest the Board's Order, it does not require an unnecessary duplication of proceedings. The aim of the Act is to attain simplicity and directness both in the administrative procedure and on judicial review. * * * *The breadth of the jurisdiction conferred upon the court to set aside or modify in whole or in part the Board's Order, or to permit new evidence to be taken, necessarily implies that the party proceeded against is entitled to raise all pertinent questions and to obtain any affirmative relief that is appropriate.* * * *"

Furthermore, the position and contention of Petitioner that no right of review of its own violations of Section 9 (a) and (c) exists in such a case as this, where the *employees* have been denied their vitally paramount right of election of a representative of their own choosing for collective bargaining, and that the *only* right of review is one relating solely and exclusively to questions of unfair labor practices by *an employer*, would leave the Act in the anomalous state of providing remedy by court review only for unfair labor practices by the *employer*, and of utterly failing to provide remedy respecting the *rights of employees* which the Act secures and declares to be as of supreme importance to *them*. *In other words, the Board contends that violations of the Act against employees upon the Board's own part are not subject to remedy by judicial review, and may not be remedied or relieved against, within the provisions of the Act.* The position of the Board is that *employees*, who can not, under the provisions of the Act, commit un-

fair labor practices, but *against whom the Board may violate the provisions of the Act*, are *without remedy against the Board;* that the Board may enforce relief against *employers*, and *employers* may challenge the action of the Board in that respect, *but that no matter how illegally the Board may act in dealing with the rights of employees, the latter may not, within the provisions of the Act, hold the Board accountable or within judicial control.* It is submitted that every conception of justice, as well as every fair interpretation of the Act, must instinctively reject such a contention. The construction of the Act so contended for by the Board would make the Act, as applied to a situation such as the one in this case, as noted by the Court below (R. 47), unconstitutional as in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

I. B. E. W. v. National Labor Relations Board, 305 U. S. 197; 232-233; 233.
Morgan, et al., vs. United States, 304 U. S. 1.
St. Joseph Stock Yards v. United States, 298 U. S. 38.
Morgan v. United States, 298 U. S. 468.
Southern R. Co. v. Virginia, 290 U. S. 190.
Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287.
Turner, et al., v. Wade, etc., 254 U. S. 64, 70.
Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 457, 458.
Interstate Commerce Comm. v. Louisville & N. R. Co., 227 U. S. 88.

It is submitted that this contention of Petitioner is condemned, and that the contention made by Respondents, as Petitioners in the Court below, for relief, protection and remedy against violations and denial of their vital

rights under Sections 7 and 9, and under the policy of the Act, is *sustained*, by the broad, plain provisions of Section 10 (f) of the Act, which give the right, unrestrictedly, to any person aggrieved by a final order of the Board, granting or denying in whole or in part the relief sought, to obtain a review of such order.

I. B. E. W. v. National Labor Relations Board, 305 U. S. 197, 232-233; 233; 234-235; 236-237.

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1; 32-34; 42; 42-45.

In re Labor Board, 304 U. S. 486, 493.

Ford Motor Co. v. National Labor Relations Board, 305 U. S. 364, 369.

Texas & New Orleans R. Co. v. Brotherhood of R. etc. Clerks, 281 U. S. 548.

Virginian R. Co. v. System Federation No. 40, 300 U. S. 515.

Federal Power Comm. v. Pacific Power & Light Co., et al., 307 U. S. 156.

Rochester Telephone Corp. v. United States, 307 U. S. 125.

United States v. Maher, etc., 307 U. S. 148.

Federal Radio Comm. v. Nelson Bros. Bond & Mtge. Co., 289 U. S. 266.

American Sumatra Tobacco Corp. v. Securities & Exchange Comm., 93 F. (2) 236 (C. A. D. C.)

Heitmyer v. Federal Communications Comm., 95 F. (2) 91 (C. A. D. C.)

In *National L. R. Bd. v. Jones & Laughlin S. Corp.*, 301 U. S. 47, this Court, per Mr. Chief Justice HUGHES, referring to the "procedural provisions of the Act", said:

> *"Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all*

questions of constitutional right or statutory authority are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation. It is not necessary to repeat these rules which have frequently been declared."

The question as to the scope of the review by a Circuit Court of Appeals of an administrative order, when such review is sought, as here, under and *within* provisions of the administrative act, was adjudicated in *Federal Radio Commission v. Nelson Bros. Bond & Mtge. Co.*, 289 U. S. 266, involving a section of the Radio Act of 1927 limiting review to questions of law. This Court in that case, speaking through Mr. Chief Justice HUGHES, said (p. 276):

"Questions of law form the appropriate subject of judicial determinations. Dealing with activities admittedly within its regulatory power, the Congress established the Commission as its instrumentality to provide continuous and expert supervision and to exercise the administrative judgment essential in applying legislative standards to a host of instances. These standards the Congress prescribed. The powers of the Commission were defined, and definition is limitation. *Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision. These are questions of law upon which the Court is to pass.* * * *

"* * * But that (judicial) character is not altered by the mere fact that the remedy is afforded by appeal. The controlling question is whether the function to be exercised by the Court is a judicial function, and if so, it may be exercised on an authorized appeal from the decision of an administrative body. We must not 'be misled by a name, but look to the substance and intent of the proceeding'. *United States v. Ritchie*, 17 How., 525, 534; *Stephens v. Cherokee Nation*, 174 U. S. 445, 479; *Federal Trade Commission v. Eastman Co.*, 274 U. S. 619, 623; *Old Colony Trust Company v. Commissioner*, 279 U. S. 716, 722. * * * When on the appeal, as here provided, the parties come before the Court of Appeals to obtain its decision upon the legal question whether the Commission has acted within the limits of its authority, and to have their rights, as established by law, determined accordingly, there is a case or controversy which is the appropriate subject of the exercise of judicial power. * * *"

In *American Sumatra Tobacco Corporation v. Securities and Exchange Commission*, (C. A. D. C.), 93 F. (2), 236, judicial review was sought of an order of the Commission, pursuant to a section of the Securities Exchange Act similar to Section 10 (f) of the Act here. The Commission moved to dismiss on the ground that:

"The actions of the respondent (Commission) complained of in the petitions herein do not constitute reviewable orders within the meaning of Section 25 of the * * * Act conferring jurisdiction on this Court to review orders of the respondent, (and) this court has no jurisdiction to entertain such petitions or to grant the relief prayed for, * * *."

In denying the motion to dismiss the petitions for review, the Court there said:

"Here the petitions for review allege irreparable injury * * * *and the motion to dismiss concedes the truth of this allegation.* In such a case it is fundamental that the property rights of the citizen may not be put in jeopardy or destroyed in any proceeding before an administrative board without notice, hearing and *judicial review*, and we think it is not correct to say that either the language of the act *or anything which appears in the reports or hearings in Congress* justifies the conclusion that Congress intended by the permissive language of Section 24 (b), to deny the right of review * * *. Congress has undertaken to provide *within* the Securities Exchange Act the machinery by which judicial orders of the Commission may be reviewed. In this regard the Act is different from, for example, the Commerce Act. This fact indicates to us that Congress meant the Act itself to cover the entire field of review of the Commission's judicial action. We are not concerned here with an administrative ruling such as was made in *Third Avenue Ry. Co. v. Securities and Exchange Commission*, 85 F. (2), 914, but with action which operates *particularly* rather than generally—with a judgment entered on a state of facts and affecting only one person.

"* * * And we think what was said by Mr. Justice Holmes in *Interstate Commerce Commission v. Northern Pacific Ry. Co.*, 216 U. S. 38, is applicable to the point we are discussing, that is to say, that we are dealing with an administrative order which it is charged and, for the purposes of this motion admitted, seriously affects property rights, and if the Commission's present position is right we should be approving a practice which would permit this to be done by way of fiat rather than by adjudication. *In such circumstances we think it would be going very far to say that the rights of the parties may not be inquired into by the courts.*

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"* * * it follows that Congress has provided *within the Act* the exclusive remedy for persons aggrieved by the operations of the Act. *Sykes v. Jenny Wren Co.*, 78 F. (2) 729, sufficiently covers this point."

In *Pacific Power & Light Company, et al., v. Federal Power Commission*, (C. C. A. 9), 98 F. (2) 835, the question presented was the reviewability of an order of the Power Commission under Section 315 (b) of the Power Act, closely resembling Section 10 (f) of the Act here. The Commission there moved to dismiss the petition for review, advancing in support of their contention the same arguments as the Board here. In overruling the motion to dismiss, and in holding the order, which had denied permission to two public utility companies to merge, properly reviewable *within* the provisions of the Act, the Court said:

"It should be observed that if the contention of the Commission be correct, no remedy exists in the event that a right to the consolidation has been conferred * * * which has been unjustly denied to the petitioning power companies. The provisions of the statute for filing the petition for review in this Court is, therefore, meaningless. * * * If we have no jurisdiction because the denial must necessarily be cast in terms of negation, then every decision of the commission adverse to such petitioners is final and not subject to review.

"Nor is there any merit in the contention that the denial merely places the petitioners in the same status as before applying for the order. On the contrary, if the petitioners' contention * * * be correct, before the order they were in possession of a right granted by Congress. After the order, they were deprived of it.

"When such a claimed substantive right so definitively created by the Act is denied, the petitioner is

a 'party aggrieved', within the specific provisions of Section 313 (b) * * * (which) authorizes this Court to 'affirm, modify, or set aside the order in whole or in part.' We need not now decide whether we may 'modify' such a denying order by making it an approval of the consolidation. It is sufficient for our jurisdiction that we may order it 'set aside'.

"The Commission cites no Supreme Court cases holding otherwise. In *Procter & Gamble Co. v. United States*, 225 U. S. 282; *Hooker v. Knapp*, 225 U. S. 302; *Lehigh Valley R. Co. v. United States*, 243 U. S. 412; and *Piedmont & Northern R. Co. v. United States*, there are no specific rights definitely outlined in the statute and conferred on the petitioners and the acts *make no provision for a judicial review* on the petition of the owner of an alleged right claimed to have been frustrated by the denial of its exercise. The distinction, in regard to a specific provision for review *in the act itself*, between these and similar cases and the case at bar is shown in *United States v. Griffin*, 303 U. S. 226.

"The order sought to be reviewed is a final order determining the nonexistence of the right, not a mere finding or report as in *United States v. Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, * * * and *Shannahan v. United States*, 303 U. S. 596; nor a mere notice of hearing, as in *Federal Power Commission v. Metropolitan Edison Co.*, 58 S. Ct. 953."

In *Federal Power Commission v. Pacific Power & Light Company, et al.*, 307 U. S. 156, this Court affirmed the case last above quoted from, and, speaking through Mr. Justice FRANKFURTER, said (p. 159):

"But the Power Act contains a distinctive formulation of the conditions under which resort to the Courts may be made and Congress determines the scope of jurisdiction of the lower federal courts. Section 313 (b) provides that 'any party to a pro-

ceeding under this Act aggrieved by an Order issued by the Commission in such proceeding may obtain review of such order in the Circuit Court of Appeals of the United States'. The denial by the Commission of approval of the application by petitioners of the transfer * * * was an 'order', and the petitioners were 'aggrieved' by it since without such approval the transfer was forbidden. * * *

"The Court has power to pass judgment upon challenged principles of law insofar as they are relevant to the disposition made by the Commission. '* * * a judgment rendered will be a final and indisputable basis of action between the commission and the defendant'. In making such a judgment the Court does not intrude upon the province of the Commission, while the constitutional requirements of 'case' or 'controversy' are satisfied. * * *"

C.

The Decision of the Court below is not, as claimed by Petitioner, in conflict with the decisions of other Courts of Appeals. Assuming the correctness of all such other decisions, cited by Petitioner, none of them involved or presented circumstances or questions essentially similar to those in this Case, which involve an Order by which the Board illegally and finally deprived Employees of the right to select, by Election, Representatives of their own choosing for Collective Bargaining—the Cardinal Right given Employees by the Act for their own benefit and protection and to effectuate its avowed policy.

All of the other decisions of Courts of Appeals cited by Petitioner as being contrary to that of the Court below involve the question of the review, under the Act, of *certifications* issued by the Board, and none of them in-

volves or presents circumstances or questions analogous to those in the instant case.* The admitted facts support this differentiation.

The Board's Order of March 1, 1939, which the Court below set aside, directed an "election" by the employees of the Company of a representative for collective bargaining, *and specifically ordered and required the use at the "election" of a secret ballot from which the name of the Respondent, the Brotherhood Local, was to be entirely excluded and omitted,* and upon which *only* the name of the CIO Union was to appear, so that the electors *had to vote solely and exclusively for or against the CIO Union, with no other or alternative expression or choice.* This requirement of the Board, which was promulgated under Section 9 (c) of the Act, was characterized by the Court below as follows (R. 46):

> "We think the order was *illegal* and that the proposed election was unfair in effect. It was in the teeth of the policy formulated in the statute, that the employees should be protected in the exercise of full freedom of designation of representatives of their own choosing. The employee was not given full freedom of choice. If he voted he could either ratify or reject the nominee of the Board, but if he rejected it he was through. He had no alternative —he could not choose for himself. He could take the representative offered him or none at all—a parallel of Hobson's choice."

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* One of the cases cited by the Board, *Unlicensed Employees of Sabine Transportation Co. v. National Labor Relations Board,* (C. C. A. 5), decided November 12, 1937, without opinion, is unreported, and the Respondents have been unable to ascertain either the questions presented therein or the reasons for the dismissal of the proceedings. The meager statement of the case in *Commerce Clearing House, Labor Law Service,* referred to by Petitioner, throws no clear or real light on that case.

The Petitioner, in its attempted analogy between the circumstances in the decisions cited by it and those in the instant case, as well as in its argument generally, misses and disregards the essential point of the whole matter, namely, the *harmful illegality* of the Order, which was in *prevention and denial of the right of an election*, as *contradistinguished* from an order *providing for an election*, or a certification of facts or findings based upon an *election*. The *denial* of an *election*, under the pretense that an election is being provided for and secured, whether under the mask of an investigation or a certification, *is a wrong operating instantly and finally to the injury and prejudice of the employees in question, and, if not arrested and remedied, inflicting permanent and irreparable injury upon such employees.* The Petitioner's claims in this case, which would usurp and appropriate the powers and functions of judicial review by the Courts of Appeals, and oust and exclude said Courts from control and remedy, under the Act, of any and every illegality which the Board may perpetrate *against employees*, as distinguished from employers, are, it is respectfully submitted, plainly as intolerable as they are untenable.

Petitioner cites, as being in conflict with the decision in the instant case, *Combustion Engineering Co. v. National Labor Relations Board*, 95 F. (2) 996, in which the Court below on March 18, 1938, in a memorandum decision, dismissed a petition for review of an order of the Board. No reasons are assigned by the Court below in said memorandum decision for its action, but it is apparent, merely from the title of that case, that relief was there sought by a *company or employer*, and not by employees in an effort to protect themselves against

infringement of their supremely important and specifically guaranteed rights under the Act, *fundamental in their nature*, as here. Moreover, and importantly, as will be shown in the discussion herein upon the intent of Congress as evidenced by the Congressional Reports referred to in the Board's Brief, it seems plain that whatever limitations were intended by Congress to be placed upon the right to judicial review, under the Act, were intended to be placed upon the right of *employers* to such review, and not upon the right of *employees* to the review of *illegal* orders of the Board depriving such *employees* of their rights to their final and irreparable injury. As the Court below, on this point, said (R. 47):

> "In this situation (where no unfair labor practice is involved), does this court have jurisdiction to review the order complained of, which as we have pointed out, *destroys* the right of petitioners, guaranteed by Sec. 7 of the Act, in the exercise of full freedom to bargain collectively with the Company through representatives of their own choosing? We think it does. *We cannot think that the Congress overlooked this important matter.* * * * This essential property right was not only guaranteed but was safeguarded; otherwise the Act itself would be subject to serious inquiry as to whether it violates the due process clause of the Fifth Amendment."

The *per curiam* opinion in *New York Handkerchief Mfg. Co. v. National Labor Relations Board*, 97 F. (2) 1010 (C. C. A. 7), does not reveal what question was presented to the Court for decision, but it is plain that the petition for review there, which was filed by an *employer*, was dismissed by agreement of counsel. *Wal-*

lachs's, Inc., v. Boland, 277 N. Y. 345, was an attempt by an *employer of labor* to review a *certification* order of the New York State Labor Relations Board. The conclusive difference between the standing of an *employer* and *employees*, to have even certification reviewed, is importantly noted in the opinion in that case in the Appellate Division (253 App. Div. 371, 373) wherein the Court stated that "a different question might be presented if the determination involved only *a dispute between employees* concerning the right to represent their fellows. * * *"

Cupples Company Manufacturers v. National Labor Relations Board, 103 F. (2) 953 (C. C. A. 8), (which relies for its holding upon *American Federation of Labor v. National Labor Relations Board*, 103 F. (2) 933, and *United Employees Ass'n. v. National Labor Relations Board*, 96 F. (2) 875, all three of which cases involve *certifications* of the Board and are cited by Petitioner as being in conflict with the decision below) plainly concerns a situation totally unlike that presented here, because there no element of *impropriety or illegality* was alleged in or in connection with the order of the Board therein which "directed that as a part of the investigation to ascertain representatives for the purpose of collective bargaining, an election by secret ballot should be conducted at such time as the Board might specify, among the employees in a unit found by the Board to be appropriate for purposes of collective bargaining". *Without anything whatever* in the *Board's Order* to indicate any element of *illegality, deprivation or prejudice* with reference to either employer or employees, the Court in that case could hardly escape the conclusion that the investigation, *as to which no impro-*

priety of any sort was complained of or revealed, had not reached the state of a final order directed against the Petitioner, *the employer*, and that, until it had reached that stage, the *petitioning employer* was not entitled to a review or hearing in that Court.

The *United Employees Association* case, *supra*, likewise furnishes neither indication nor suggestion of *illegality* on the part of the Board, and, both in the questions presented and the facts involved therein, is totally unlike the instant case. There the petitioner for review was a labor organization *already under a bargaining agreement with the employer*, and the *certification* of a rival organization, which was the act of the Board complained of, did *nothing*, in itself, to change the existing relationship between the petitioner and the employer. And, in the real and genuine election there held, *the rival union actually had received a majority of the votes of employees designated as having been eligible to vote.*

The decision of the Court of Appeals for the District of Columbia in the *American Federation of Labor* case, which is pending in this Court on Certiorari, clearly is based upon the supposed analogy of cases dealing with provisions of the Urgent Deficiencies Act of 1913 providing for the review of orders of the Interstate Commerce Commission which, it is submitted, are not applicable to cases dealing with administrative acts, as here, where provision for review is made *within the Act itself*. That case cites, as authority for its holding that the certificate of the Board there was not reviewable, *Shannahan v. United States*, 303 U. S. 596, which case, together with *United States v. Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, both involving the Urgent Deficiencies Act, were

rejected as unauthoritative in *Pacific Power & Light Co. et al. v. Federal Power Commission*, 98 F. (2) 835 (C. C. A. 9) which was affirmed by this Court in *Federal Power Commission v. Pacific Power & Light Co., et al.*, 307 U. S. 156, and it also relies upon *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, which likewise dealt with an order of the Commerce Commission. It is submitted that, exclusive of the obvious factual differences between the *American Federation of Labor* case and the instant case, which are hereinafter pointed out, the holding in the former case has been overruled by the decision of this Court in the *Pacific Power & Light Company* case (and in *Rochester Telephone Corp. v. United States*, 307 U. S. 125, and *United States v. Maher, etc.*, 307 U. S. 148), which makes a clear distinction between the scope of the review of orders of administrative boards under administrative acts containing *in themselves* provisions for such review, and the Commerce Act, which does not, and whose orders must be reviewed under the Urgent Deficiencies Act. And other arguments may be advanced to show such distinction, for example, that the review afforded by the Urgent Deficiencies Act is limited to cases of public interest (see *Griffin v. United States*, 303 U. S. 226, 234); that while the regulatory authority of the Commerce Commission is general and comprehensive, *that of the National Labor Relations Board is defined and limited by the scope and provisions of the Act;* and that as the Congressional Committees must have been familiar with the terms of the Commerce Act, containing no provisions for review of orders of the Interstate Commerce Commission, and the limited review of such orders afforded by the Urgent Deficiencies Act, it was intended in the National Labor Relations Act to pro-

vide for a new and more comprehensive review of administrative orders representing a distinct departure from the Urgent Deficiencies Act.

Referring to the factual distinctions between the *American Federation of Labor* case and the one at bar, it should first be noted that the main contention of the petitioning unions there was as to the designation by the Board of the appropriate unit for purposes of collective bargaining, *which the Board is, by Section 9 (b) of the Act, expressly given broad discretionary powers to determine*. But the cardinal distinction between the situation in that case and the one at hand, in view of the authorities hereinafter cited which establish that the finality of an order for purposes of its review is determinable by consideration of the extent to which rights are denied or abridged thereby, is that *there the successful union actually embraced in its membership a majority of employees eligible to vote in the unit designated as the appropriate one*. In other words, in that case the certificate issued by the Board did not abridge the rights of the petitioning unions to represent employees in collective bargaining, as did the Second Direction of Election here, because the successful union there was actually preferred by a majority of the eligible employees, whilst in the instant case the *right* of Respondents *to represent* employees of the Company was, by said Second Direction of Election, *completely and finally precluded* in spite of the determination, at the original election, that the CIO Union represented less than a majority of eligible employees and less than a majority of those voting.

Nothing but a strange confusion of thought could fail to contrast the situations in the cases cited by the Petitioner,

as being in conflict with the decision of the Court below, with the circumstances involved here, or the *certifications* in those cases with the *Order* complained of herein, which allowed only a strictly limited *veto* in lieu of an *election*—the whole thing a contraption which illegally *denied* an election, instead of legally *permitting* one.

The Petitioner, in reliance upon the holdings in the several *certification* cases which it cites, argues that: "If a certification—the final step in a representation proceeding—is not reviewable, a *direction of election*, which is a preliminary instruction by the Board to its own subordinate officials to take certain proceedings as part of the investigation concerning representation, *a fortiori*, is not reviewable". That position of Petitioner *herein* is manifestly both *inapposite* and *fallacious*, because the Board's Order was *not* a *"direction of election,"* but the *denial and prevention* of an *election*—a fundamental right guaranteed to employees by the Act. And aside from that and other fallacies in the Board's position on this point, shown herein, another obvious and decisive answer to it is given in the Opinion of the Court below, wherein it is said (R. 47):

> "Respondents insist that the order is not final, but *it was final not only in its effect* but *in that it was the last order to be made under the procedure set out in the Act for the determination of representatives of employees for the purposes of collective bargaining with the Company.* It is true that if the election had been held it was the duty of the Board to certify the result; *but a certificate is not an order.*"

D.

The Congressional Reports and the Statements made on the floor of the Senate, relied on by Petitioner, have no relation to and do not support its construction of the Act against the right of Respondents to Judicial Review thereunder of the Direction of "Election," but said Reports and Statements show merely a legislative intention to restrict Judicial Review only as against procrastinating and objectionable tactics of employers, and not to orders denying and preventing elections and illegally and finally denying employees their vital rights involved therein.

Petitioner seeks to justify the construction it places upon the Act against the right of Respondents to judicial review thereunder of the Direction of "Election" by quotations from the Reports of the Committees of the Senate and House of Representatives which considered the Bill which became the National Labor Relations Act, and from certain statements of Senator Walsh, Chairman of the Senate Committee, in response to questions on the floor of the Senate. It is submitted, however, that those Reports and the remarks of the Chairman of the Senate Committee merely demonstrate that, whatever limitations were intended by Congress to be placed upon the rights of *employers* to judicial review under the Act of *election* orders, not the least intention is expressed in, or may be implied from, them to deny or proscribe the rights of *employees*, as persons aggrieved within the broad language of Section 10 (f) of the Act, to judicial review of orders of the Board *illegally denying, instead of providing for, elections* of representatives for collective bargaining.

That the intent of Congress upon the subject was to prevent *employers* and *companies* from interposing vexatious and procrastinating appeals from orders *directing elections* is the plain and true purport of the texts of the Reports and of the remarks selected and quoted by Petitioner; but any intent to deny to *employees* the right to review, by the Courts of Appeals, under the Act, of orders of the Board depriving such *employees*, by means of an *illegal device improperly designated by the Board* an *"election"*, of vital rights specifically designed to secure to them their basic and principal right under the Act, is not even intimated in the Reports of either of the Branches of Congress or in the remarks of Senator Walsh.

For example, in the Report of the House Committee (H. Rept. 1147, 74th Cong., 1st Sess., pp. 6-7) referring to the procedure providing for judicial review under Public Resolution 44, 73d Cong., 2d Sess. (48 Stat. 1183) of election orders of the Old Board, it is said:

> "The weakness of this procedure is that under the provision for review of election orders *employers* have a means of holding up the *election* for months by an application to the circuit court of appeals.
>
> * * *
>
> "The *election* is but a preliminary determination of fact, and there is no reason why *employers* should have an opportunity for court review prior to the holding of the *election*. The ability of *employers* to block *elections* has been productive of a large measure of industrial strife. When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees for collective bargaining, and the *employer* refuses to accord such recognition, the union, unless an election can promptly be held to

determine the choice of representation, runs the risk of impairment of strength by attrition and delay while the case is dragging on through the courts, or else is forced to call a strike to achieve recognition by its own economic power. * * *"

The Report of the Senate Committee on Education and Labor, S. Rept. 573, 74th Cong., 1st Sess., pp. 5-6, declares that:

"Under Public Resolution 44, any attempt by the Government to conduct an *election of representatives* may be contested *ab initio* in the courts, although such election is in reality merely a preliminary determination of fact. * * * After almost a year not a single case, in which a *company* has chosen to contest an *election* order of the Board, has reached decision in any circuit court of appeals."

In the Report of the House Committee above referred to, after referring to actual cases, all of which involved petitions of employers and companies to review election orders of the Board, it is said (p. 7):

"* * * The *companies* in these cases had made every preparation to wage a war with striking employees, *rather than to submit to the orderly democratic process of a governmentally supervised election to determine by whom the employees desired to be represented in collective bargaining negotiations.*"

The excerpts from the Congressional Record, showing the colloquy between Senator Walsh and Senator Couzens on the floor of the Senate, which appear in Petitioner's Brief, (pp. 26-27), do not completely show the discussion had at that time on the question of the reviewability of election orders of the Board, but, it is sub-

mitted, the parts of said discussion omitted by the Board from its Brief furnish additional evidence to support Respondents' position as to the lack of any legislative intention to limit judicial review as the Board claims. The full statement of Senator Walsh was (79 Cong. Rec., Part 7, p. 7658):

> "Mr. Walsh: * * * It (Resolution 44) was impotent, because, where *employers* resist an *election* order by the Board, provision is made for a Court review prior to holding the election, and several cases are now in the Courts, and the Board has not been able to hold *elections*.
>
> "Mr. Couzens: The Senator said that Resolution 44 was ineffective. Will he tell us before he concludes why Resolution 44 was ineffective?
>
> "Mr. Walsh: * * * In cases where attempts have been made to hold elections the claim has been made that the Board had no legal authority; the cases have been brought into Court, and they are in the courts and undecided. It has been effective where the employer was willing to cooperate with the Board and hold elections; it has been effective in that respect. * * *"

The position of the Board, in so far as it relies upon the language contained in the Congressional Reports and the statements of Senator Walsh above quoted from, is plainly based upon the false premise that the Order in the instant case is identical with those referred to in said Reports and by Senator Walsh, namely, an order *providing for* an election by employees of representatives, *designated and selected by their own free choosing*, for collective bargaining, or, as stated in the House Report, an "orderly *democratic process* of a governmentally supervised *election*"; whereas in fact, as shown hereinbe-

fore, the Order complained of and which was directed to be set aside by the Court below does *not* "direct an *election*" at all, but *effectually denies and prevents an "election" in any established, just or legal sense of the term.* So that, whatever may be said of the contents of the Reports or the statements of Senator Walsh above referred to as limiting or restricting the right to judicial review under the Act, the manifest reference of Congress was to the *democratic process of election*, and orders passed *therefor*, and *not* to such an Order, as is here involved, which neither directs nor provides *for an election*, but *denies* it and its essential rights, requisites and purposes.

The submission by Petitioner of said Reports and statements in support of its contentions simply begs the question, because the very question presented for decision below was whether the so-called "election" was an election at all within the meaning of the Act and its purpose and policy, and within the admitted meaning which Congress, following well established and familiar principles, intended to impute to the word *election*.

The definitions of an "election" (*supra*, pp. 30-31), convey its accepted and established meaning, and Congress must certainly be taken to have intended its accepted and established meaning when it provided for *elections* by employees of *representatives* of their own free choice. In its accepted and established sense it is true that, as stated in the excerpt quoted above from the Senate Report, "An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of the employers or employees", but when, as here, one of the candidates is

denied and deprived of the right to appear upon a ballot to be used at an "election", and the right is denied to the voting employees to *express* their choice for a representative "*of* their own choosing", then, it is respectfully submitted, such "election" is *not* the mere determination of a preliminary fact, or any fact at all, but *is* a determination denying and destroying rights not only of eligible electors—in this case the eligible employees—but also of eligible candidates, including in this case the Respondent, the Brotherhood Local, whose name was excluded from a place upon the ballot.

E.

The Board's Second Direction of Election was a final order which conclusively and irretrievably denied to and deprived Respondents of their personal and property rights to their irreparable injury.

The fact that the Second Direction of Election was not called by the Board either an order or a final order did not, and could not, affect its nature or its finality. Just as an interlocutory or preliminary direction will not be converted into a final order simply by characterizing it as such, a final order may not be made an interlocutory, preliminary or procedural one by designating it a decision or direction. The true test of finality, adhered to in the federal decisions from the inception of the rule in this Country that only final orders will be reviewed on appeal, is that whether an order or decree is final is not to be determined by the name by which it is called, but by its substance, its inherent nature and its effect.

The Second Direction of Election was an Order because it promulgated a command, and ordered, directed and

required it to be carried out. It was definitive, rather than preliminary or procedural, because it determined absolutely and conclusively, and ordered, directed and required, how the so-called "election" was to be held and how the ballot to be used was to read, that is, with a choice on it only for or against the CIO Union, and with the name of the Respondent, the Brotherhood Local, entirely excluded and omitted therefrom. It was definitive, moreover, in so far as Respondents were concerned, because there was no further procedure or step that could have been taken by Respondents under the Act or the Board Rules and Regulations to alter, change or vary the terms and provisions of the Supplemental Decision and Second Direction of Election. All possible remedies within the Act and the Rules and Regulations had been resorted to and exhausted, except the remedy provided for review by the Court below. The Second Direction of Election was not preliminary because, under its mandate and requirements, the rights of Respondents, in so far as any possibility existed of becoming the representative for collective bargaining at the "election" to be held for that purpose, were terminated. The holding of the so-called run-off "election", whether the CIO Union would have won or lost, and whether or not the Board would ever have been called upon to certify the CIO Union as representative, could not possibly have changed the altered position of Respondents as it was affected by the Board's Order, in so far as their rights were concerned. No further step which might have been taken by anyone before the Board would have made the position of Respondents any more or less mature than it became by virtue of the operation and affect of the Decision and Direction of Election. Furthermore,

the Decision and Direction of Election operated particularly upon Respondents, rather than upon the world at large or upon a class of persons. The rights of no general classification or group of persons, other than Respondents and their members, were affected or precluded.

The Supplemental Decision and Second Direction of Election was entered and issued in a proceeding which was clearly adversary in character, in that the contentions and application of Respondents as to the manner and form of the proposed "election", as stated in their letter and Petition of February 11, 1939, and in the oral argument in their behalf before the Board, were opposed by the Board itself as well as by their competitor for the position of representative for collective bargaining, the CIO Union, as is shown in the letters to the Board in its behalf of February 2 and February 6, 1939, *requesting a ballot in the run-off election for or against the CIO Union.*

The contention of Petitioner on this Point is that the Direction of Election is not an Order because it "does not purport to require Respondent, or anyone other than the Board's Regional Director, to take or refrain from taking any action." That statement is not even technically, much less substantially, accurate, because the Direction of Election affirmatively requires the membership of Respondents, if they desire to vote at all at the run-off election, to vote either for the CIO Union or against it, and it restrains and enjoins them from voting for their own Brotherhood Local. A contention similar to that here made by the Board was made by it in *International Brotherhood of Elect. Workers v. National*

Labor Relations Board, 305 U. S. 197, 232-237, in which an order of the Board, invalidating collective bargaining agreements of labor unions, without joining such unions as parties, was held illegal in that respect by this Court. In that case the Board contended that the unions in question need not have been joined as parties to or notified of the existence of the proceedings invalidating their contracts, because the order of the Board "did not run against the unions", and did not require *them* to do anything or refrain from doing anything, but ran only against the employers and required only the employers to act or refrain from acting; and that in proceedings relating to "unfair labor practices" only the employers, who alone could commit such practices, could be made parties and were subject to Orders of the Board, and that employees and labor organizations could not be made parties, or claim relief from the Board's Orders, because its Orders, in such cases, did not run against *them*. Those contentions were, by this Court, held to be unsound and rejected, because, although the order there did not, on its face, purport to run against the unions or expressly require them to do or refrain from doing anything, it did, nevertheless, *actually* destroy their rights and property, just as does the Board's Order in the instant case.

The Petitioner, further, seeks to assimilate the question presented in this case to that involved in *American Federation of Labor v. National Labor Relations Board*, *supra*, in which the Board, in an extended argument, in contending that the *certification* involved in that case was not judicially reviewable under the Act, maintains that administrative action which affects rights only on the contingency of future administrative action,

or which does not command that anything be done or not done, is not reviewable judicially, citing, in support of that position, *United States v. Los Angeles, etc., R. Co.*, 273 U. S. 299, which case also is cited and relied upon by Petitioner in the instant case.

As shown hereinabove, the *American Federation of Labor* case is clearly distinguishable from the one at bar in several important respects which will not be repeated here. It is further respectfully submitted that the *Los Angeles Railroad Company* case, in which review of a finding of the Interstate Commerce Commission was sought under the Urgent Deficiencies Act, is clearly inapplicable for a number of reasons. First, the Court there said, concerning a *valuation finding* of the Commission, that it was "merely preparation for *possible action* in some proceeding which *may be instituted* in the future". In the instant case the Supplemental Decision and Second direction of Election were entered and issued *as a result* of a proceeding distinctly adversary in its nature, which proceeding was instituted, heard and determined prior to the entering and issuing of the Order, and the only things which remained to be done thereafter were ulterior proceedings (wherein Respondents were actually and finally deprived of their rights under the Act) to carry out and execute the mandate of the Board. In the *Los Angeles* case, counsel for it conceded that the finding there did *not* require the Railroad Company to "*do or refrain from doing some specific thing*", the contention there being that such a direction was not necessary (see argument for Company in that case, 273 U. S. 299, 303). In that case, to quote the language of the Court, the finding did not "grant or *withhold any authority, privilege or license*", nor "*extend or abridge any power or facil-*

ity", nor "change the carrier's existing or future status or condition" nor "determine any right or obligation". In the case at bar, the Board's Order does all of those things.

Equally as important, as a distinguishing factor between the *Los Angeles* case and the case at hand, is the fact that the provisions of the Urgent Deficiencies Act of 1913 (28 U. S. C., Secs. 45 and 47a), under the provisions of which review of the Commission's findings was there sought, are not at all analogous to Section 10 (f) of the Act here. Nor is the Commerce Act comparable to the National Labor Relations Act, because the former contains no provision whatsoever for review. In cases construing review provisions similar to those in the Act here involved, such as *Federal Power Commission v. Pacific Power & Light Co., et al.*, 307 U. S. 156, and *American Sumatra Tobacco Corp. vs. Securities and Exchange Commission*, 93 F. (2) 236, in which the doctrine of negative orders, under the *Los Angeles* case and other cases under the Urgent Deficiencies Act, was advanced and relied upon by administrative boards in opposition to judicial review, the obvious differences between the Commerce Act and the Urgent Deficiencies Act, on the one hand, and the administrative acts *containing within themselves* review provisions, on the other, have uniformly impelled the Courts to reject, as not even persuasive, such decisions concerning orders or findings of the Interstate Commerce Commission. In the *Pacific Power & Light Company* case, *supra*, this Court, speaking through Mr. Justice FRANKFURTER, said:

> "But the Power Act *contains* a distinctive formulation of the conditions under which resort to the Courts may be made and Congress determines the

scope of jurisdiction of the lower federal courts. * * * Thus the *statutory scheme* of the Power Act only reinforces the analysis made in the *Rochester* case."

See also:

Rochester Telephone Corp. v. United States, 307 U. S. 125.

F.

The finality of the Second Direction of Election, for purposes of its reviewability under the provisions of the Act, is determinable by its actual operation and effect, and the substantiality of the rights which it abridges or denies.

The fact that the so-called run-off "election" had not been held, and that there remained to be done certain administrative or procedural acts before the completion of the investigation being conducted by the Board, in no wise detracted from the intrinsic nature and effect of the Second Direction of Election, or from its finality within the meaning of the words "final order" used in the Act. The authorities are in entire accord on that proposition.

In what is perhaps the leading case on this subject, *Forgay, et al., v. Conrad*, 47 U. S. 201, this Court, speaking through Mr. Chief Justice TANEY, affirmed the rule that the words "final decrees", used in acts of Congress relating to the reviewability of decisions of lower courts, are to be given a liberal and reasonable construction, and that if an order be final upon the merits of a matter in dispute, and may not be reconsidered or modified by the Court passing it, in relation to the matters decided, although there remain in the cause further or ulterior

proceedings, such order is nevertheless final and appealable, particularly if irreparable injury will result to the aggrieved party, from the operation of such order, during the pendency of such ulterior proceedings.

In *United States v. River Rouge Co.*, 269 U. S. 412, this Court, speaking through Mr. Justice SANFORD, said (p. 414):

> "While the general rule requires that a judgment of a federal court shall be final and complete before it may be reviewed on a writ of error or appeal, it is well settled that an adjudication final in its nature as to a matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy, may be reviewed without awaiting the determination of the general litigation. *Williams v. Morgan*, 111 U. S. 684, 689; *Collins v. Miller*, 252 U. S. 364, 371; *Arnold v. Guimarin*, 263 U. S. 427, 434. And so, conversely, an adjudication final in its nature as to the general subject of the litigation may be reviewed without awaiting the determination of a separate matter affecting only the parties to such particular controversy."

In *Thompson v. Dean*, 74 U. S. 342, the decision of this Court, *per* Mr. Chief Justice CHASE, denying a motion to dismiss the appeal, was to the same effect, as are the decisions of this Court in:

Clark v. Willard, 292 U. S. 112.
Wilson v. Republic Iron Co., 257 U. S. 92.
Waco v. U. S. Fidelity Co., 293 U. S. 140.
Bandini v. Superior Court, 284 U. S. 8.
Gulf Refg. Co. v. United States, 269 U. S. 125.
North Car. R. R. Co. v. Story, 268 U. S. 288.
Central R. R. Co. v. United States, 257 U. S. 247.

Detroit, etc. Ry. Co. v. Michigan R. Comm., 240 U. S. 564.
McAllister v. C. & O. Ry. Co., 243 U. S. 302.
Wecker v. Nat'l. Enameling Co., 204 U. S. 181-182.

And see also:

St. Louis, etc., R. Co. v. Southern Express Co., 108 U. S. 24.
Hill v. Chicago & Evanston R. Co., 129 U. S. 170.
Mowrer v. Fletcher, 114 U. S. 127.
Bronson v. Railroad Co., 67 U. S. 524.
Winthrop Iron Co. v. Meeker, 109 U. S. 180.
Lewisburg Bank v. Sheffey, 140 U. S. 445.
Wheeling & Belmont Bridge Co. v. Wheeling, 138 U. S. 287.
Ormsby v. Webb, 134 U. S. 47.
Ex Parte Norton, 108 U. S. 237.
O'Dowd v. Russell, 81 U. S. 402.
French v. Shoemaker, 79 U. S. 86.

In *Rose on Fed. Juris. & Proc.* (4th Ed.), Sec. 651, it is said on this subject:

> "Our Courts have tried to make the test a *practical* one. They are inclined to hold a decree or order final and therefore, appealable, *if it requires something to be done which takes aught of substantial value from one of the parties, and if that which is commanded cannot be undone by any subsequent reversal.* * * * Speaking generally, however, whether a decree is final or not will be tested rather by *what will be its actual working than by purely theoretical considerations.*"

In 4 *Foster Fed. Pr.*, Section 695, p. 3740, *et seq.*, are given many examples of orders, analogous to that in the instant case, which were held to be final and reviewable on appeal.

In *Zoline on Fed. Appellate Jur. & Proc.* (3rd Ed.), p. 18, it is said:

> "* * * An adjudication is final and appealable if it involves a determination of a substantial right against a party in such a manner as leaves him no adequate relief except by appeal. * * * Whether a decree is final or interlocutory depends upon its essential purport and effect and not upon its characterization in the proceedings (*Simmons v. Grier Bros. Co.*, 258 U. S. 82). * * *"

See also:

Montgomery's Manual of Fed. Juris. and Proc., (3rd Ed.), Section 1011.

CONCLUSION.

Accordingly, it is respectfully submitted, for the Respondents herein, that the Decision of the Court below should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 253.—October Term, 1939.

National Labor Relations Board, Petitioner, *vs.* International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers, Local Union 876.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 2, 1940.]

Mr. Justice Stone delivered the opinion of the Court.

This is a companion case to No. 70, *American Federation of Labor, et al.* v. *National Labor Relations Board*, decided this day. The decisive question raised by the petition is whether a direction for an election made by the National Labor Relations Board in a representation proceeding under § 9(c) of the Wagner Act, 49 Stat. 449, 453, 29 U. S. C., Supp. IV, §§ 151-166, is reviewable by a circuit court of appeals under § 10(f) of the Act.

In February, 1938, International Brotherhood of Electrical Workers, Local 876, one of the respondents, and an affiliate of respondent, American Federation of Labor, filed with the regional director of the Board a petition asking an investigation and the certification of a representative, for purposes of collective bargaining, of the employees of Consumers Power Company, pursuant to § 9(c) of the Act. After a hearing, in which the petitioner, the employer, and the Utility Workers Organizing Committee, an affiliate of the Congress of Industrial Organization, participated, the Board issued a "decision and direction of election." 9 N. L. R. B. 742. At the election in January, 1939, 2,806 of the total 2,977 employees voted. Of these 1,072 voted for I. B. E. W. and 1,164 voted for U. W. O. C. After further proceedings and a hearing the Board found "that the question concerning representation which has arisen can best be resolved by the holding of a run-off election in which the employees in the appropriate unit will be given the opportunity to decide

whether or not they desire to be represented by U. W. O. C." and made its "direction" accordingly. 11 N. L. R. B. 848.

Contending that the direction, contrary to law, excludes Union 876 from the ballot on the run-off election, respondents petitioned the Court of Appeals for the Sixth Circuit to review the direction under the provisions of § 10(f) of the Act. That court set aside the direction as infringing the free choice by employees of their representatives for purposes of collective bargaining assured to them by §§ 1, 7, 9(a) and (c) of the Wagner Act. We granted certiorari October 9, 1939, so that the case might be considered with No. 70, *American Federation of Labor, et al.* vs. *National Labor Relations Board.*

Decision here is controlled by our decision in that case. The direction for an election is but a part of the representation proceeding authorized by § 9(c) and is no more subject to review under § 10(f) than is a certification which is the final step in such a proceeding a l which we have just held Congress has excluded from the review afforded by that subdivision.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.